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# D I G E S T

OF THE

# Laws of England.

BY

THE RIGHT HONOURABLE

SIR *John* COMYNS, KNIGHT,

LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

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THE FOURTH EDITION, CORRECTED,  
AND CONTINUED DOWN TO THE PRESENT TIME,

By SAMUEL ROSE,  
BARRISTER AT LAW, OF LINCOLN'S INN.

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IN SIX VOLUMES.

VOL. IV.

LONDON:

PRINTED BY A. STRAHAN,  
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;  
FOR T. N. LONGMAN AND O. REES, G. G. AND J. ROBINSON, T. CADELL,  
BROOKE AND RIDER, W. OTRIDGE, J. BUTTERWORTH, J. WALKER,  
CLARKE AND SON, AND R. BANISTER.

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ESTATES.

(A) Estate in Fee-Simple.

(A 1.) Of what Things a Man may have it.

**A**N *estate* imports the interest which a man has in lands. *Co. L. 345. a.*

Every one who has an estate in land, has the inheritance, the freehold, or a chattel interest.

Every estate of inheritance is a fee-simple, or a fee-tail.

An estate in fee-simple is, where a man has an estate in lands or tenements to him and his heirs for ever. *Lit. f. 1.*

A man may have an estate in fee-simple of all lands or tenements, or other things real. *Co. L. 1. b.*

Of lordships, advowsons, commons, estovers, and all hereditaments. *Co. L. 4. a.*

So, a man may have an estate in fee-simple descendible to him and his heirs in the isle of *Man*; though it be not parcel of the realm, but a distinct territory: for it is grantable by the king under the great seal, and therefore the estate in it shall be descendible according to the rules of the common law. *Co. L. 9. a.*

So, he may have a fee-simple in things mixt; as, in franchises, liberties, &c. *Co. L. 2. a.*

So, if a man grants to another and his heirs all woods, under-woods, timber-trees or others in such a part of a forest, saving the soil; the grantee has a fee to take *in alieno solo*. *R. 8. Co. 137. b.*

So, in things personal; as, in an annuity. *Co. L. 2. a.*

In a dignity granted to him and his heirs. *Co. L. 2. a.*

In a swan-mark. *7 Co. 17.*

In a part or share of the New-river-water. *Ca. Parl. 207.*

So, in the patronage of an hospital, or other thing created *de novo*, in which there was not a precedent estate, a man may have a fee to him and his heirs, qualified in a particular manner: as, if a queen consort institutes an hospital, and reserves the patronage *sibi & reginis Angliæ succedentibus*. *R. Ca. Ch. 214.*

But in estates *in esse* before such desultory inheritance it cannot be: as, the duchy of *Cornwall* limited to the prince & *filiis regis Angliæ primogenitis*, shall not be good, except when limited by act of parliament. *R. 8 Co. 16. Vide Roy (G).*

So, a limitation of an advowson to the queen, and the queens her successors, shall not be good without an act of parliament: for there

is no person against whom a demand may be made. *R. Ca. Chan.* 214.

If a man gives land to *A.* and his heirs of the part of his mother; the words, *of the part of his mother*, are void: for none can create a new inheritance, or descent not allowed by law. *Co. L. 13. a.*

(A 2.) By what Words.

A man cannot have a fee-simple by feoffment, or grant, without the words, *to him and his heirs*. *Co. L. 1.*

And therefore, if he purchases to him *in perpetuum*, he has only for life. *Lit. f. 1.*

Or, *to him and his assigns for ever*. *Lit. f. 1.* [*Vide 2 Bl. Rep.* 1185.]

So, if he purchases to him and his heir in the singular number. *Co. L. 8. b. Cont. per two f. 1 Rol. 832. K.*

To him or his heirs, in the disjunctive. *Co. L. 8. b.*

So, if it be to *A. & B. & heredibus*, without saying, *suis*, it shall be void for the incertainty. *Co. L. 8. b. 1 Rol. 833. l. 20.*

Tho' a warranty be added to them *& heredibus suis*: for this cannot enlarge it. *1 Rol. 833. l. 25.*

So, if by deed, reciting an agreement to convey to *A.* and his heirs, a man grants *estovers* for easement of him and his heirs by assignment, and if no assignment that he and his heir shall cut; *A.* has only for life. *R. 1 Leo. 2.*

So, if a natural person purchases to him *and his successors*, he has only for life. *Co. L. 8. b.*

So, if a body politic takes in its natural capacity: as, a lease to a dean, *&c.* for 100 years, and afterwards a release to him *and his successors*, it gives to him only for life; for he takes the lease in his natural capacity. *Co. L. 9. a.*

So, if a corporation sole, as a bishop, parson, *&c.* purchases, he has not a fee without the words, *successors*. *1 Rol. 832. l. 50.*

But a feoffment to *B. & heredibus*, without saying, *suis*, gives him a fee-simple. *Co. L. 8. b.*

So, to a son *and the heirs of his father*. *Semb. Co. L. 220. b.*

So, to *B. & liberis suis* and their heirs; if he has issue, it gives them a joint-estate in fee. *Co. L. 9. a.*

[If lands are settled on *A.* and *B.*, his wife for life, then to their child or children, in such proportions, and for such estates as the survivor shall appoint, remainder to the right heirs of *A.*, and there is but one child, it shall have the whole in fee, and *A.* has no power to dispose of any thing in case of its dying under age. *Roe v. Dunt, P. 7 G. 3. 2 Wilf. 336.*]

So, to *B. heredibus & successoribus suis*, gives a fee. *Co. L. 9. a.*

So, a feoffment or grant to a body politic and *their successors*, gives them a fee-simple. *Co. L. 8. b.*

So, a grant to the king *in perpetuum* gives him a fee, without the words, *his heirs or successors*: for he never dies. *Co. L. 9. b.*

So, a feoffment to a corporation aggregate *in perpetuum* gives a fee: for it never dies. *Co. L. 9. b. 1 Rol. 832. l. 55.*

Or, to a corporation sole, to be held in *frankalmoigne*. *Co. L. 9. b. 1 Rol. 833. l. 5.*

So,



So, if *A. re-enseoffs B. adeo plene as B. enfeoffed him*, he has a fee without the word, *heirs.* *Co. L. 9. b. 2. 1 Rol. 833. l. 12.*

So, a grant to the church of *B.* gives a fee without the word, *heirs*, or *successors.* *1 Rol. 833. l. 3.*

And a limitation *to the right heirs of B.* gives a fee, without the words, *and their heirs.* *1 Rol. 833. l. 16.*

So, by devise, a fee may be given without the words, *his heirs.* *Co. L. 9. b. Vide Devise, (N 4.)*

Or, by fine *sur consueance de droit come ceo*, &c. *Co. L. 9. b.*

Or, by a common recovery. *Co. L. 9. b.*

So, a fee passes without the words, *his heirs*, where a man gives land with his daughter, &c. in *frank-marriage.* *Co. L. 9. b.*

If a parcener, or joint-tenant, releases to his companion. *Co. L. 9. b.*

If the lord, &c. releases to the terre-tenant; which enures by way of extinguishment. *Co. L. 9. b.*

If a man releases a mere right; as, where a disseisee releases to the disseisor all his right. *Co. L. 9. b.*

So, if a rent be granted upon partition, for owelty of partition. *Co. L. 9. 10.*

So, if a peer be summoned to parliament by writ, he has a fee in his dignity, without the word, *heirs.* *Co. L. 9. b. Vide Dignity, (C 3.)*

So, by the forest law, if the king, at a justice seat, grants to another an assart *in perpetuum*, without more, he has a fee. *Co. L. 10. a.*

So, by custom, a grant of a copyhold, *sibi & suis*, or, *sibi & assignatis*, may give the inheritance. *4 Co. 29. b. Vide Copyhold, (C 7.)*

#### (A 3.) By what Means.

A man takes a fee by descent, or by purchase.

When he takes by descent, and how it shall descend, *vide in Descent, (A—C 1, &c.)*

A man may purchase a fee-simple by feoffment.

Or, by fine, or common recovery; which are of the nature of a feoffment upon record.

So, by grant, or by exchange, release, or confirmation, which are in the nature of a grant.

So, by bargain and sale. *Vide Bargain and Sale, (B 1, &c.)*

So, by covenant to stand seised. *Vide Covenant, (G 1, &c.)*

So, by devise. *Vide Devise, (N 4.)*

So, a man may gain a fee by wrong: as, by disseisin, abatement, or intrusion.

#### (A 4.) When there may be a Fee upon a Fee.

A man cannot have a more ample, or greater estate of inheritance than a fee-simple. *Lit. f. 11.*

And therefore where a man is said to be *seised in fee*, generally, it shall be understood in fee-simple. *Lit. f. 293.*

And estates tail, and all other particular estates, are derived out of a fee-simple. *Co. L. 18. a.*

And therefore, after a limitation in fee-simple, absolutely, there cannot be another estate in fee limited: for if land be conveyed to *A.*

and his heirs, remainder to *B.* and his heirs, the remainder is void. *Co. L. 18. a. Vau. 269. 2 Cro. 591.*

So, if two fee-simples come to one person, they are united into one estate: as, if tenant in tail, the reversion to the king, be attainted for treason, whereby the estate-tail is forfeited to the king: yet the king has only one estate in fee: for the estate forfeited is united to the reversion. *Co. L. 18. a.*

So, if tenant in tail grants his estate to the king. *Co. L. 18. a.*

So, if an estate-tail be made to a villein, by which the lord enters, and grants his estate to the donor; the donor has but one fee. *Co. L. 18.*

So, by a grant executed by the party, a fee cannot depend upon a fee tho' the first fee be not absolute: as, if land be conveyed to *A.* so long as *B.* has heirs of his body, the remainder to *C.*, the remainder is void. *Co. L. 18. a. Dub. Vau. 269. Acc. Pl. Com. 29. b.*

But two fee-simples of the same land may, by act of law, be in several persons: as, if a man gives land in tail to a villein, the donor has the reversion in fee, and if the lord enters, he has a fee determinable upon the death of the villein without issue. *Co. L. 18. a.*

So, a fee may be limited to another upon a contingency: as, if land be to the use of *A.* and his heirs, and if he dies without heir in the life of *B.*, then to *C.* and his heirs; the estate to *C.* is good. *R. 2 Cro. 591.*

So, if a devise be to *A.* so long as *B.* has issue of his body, and for want of such issue to *D.* and his heirs; the devise to *D.* shall be good by way of an executory devise. *Per Vau. 270.*

So, if a copyhold be granted to *A.* and his heirs, and if he dies within age, and not married, to *B.*, it shall be good. *2 Rol. 791. l. 40. Vide Copyhold, (C 11.)*

If *A.* devises to his eldest son and his heirs, and other land to his youngest son and his heirs, charged with legacies, and if either son dies before entry or legacy paid, it shall be to the survivor; it shall be good to the survivor. *Dub. Jen. 17.*

(A 5.) When it may be variable.

So, a fee ought to be fixt.

And therefore, a grant to the eldest son of the king, and the eldest sons of him and his heirs, kings of *England*, is not good without an act of parliament: for the law does not allow an inheritance to merge and revive, as often as the king has or has not an eldest son. *R. 8 Co. 17. b. Vide Roy (G).*

So, a feoffment cannot be to the use of *A.* every *Monday*, of *B.* every *Tuesday*, &c. *1 Co. 87. a.*

But an estate, certain in quantity, may be variant as to place: as, if *A.* has 12 acres to him and his heirs to be annually allotted in a meadow of 80 acres. *Co. L. 4. a.*

So, it may vary as to the person: as, there may be a partition, that *A.* shall have the manor of *D.* for a year, and *B.* the manor of *S.*, and the next year *A.* the manor of *S.*, and *B.* the manor of *D.*, and so alternis vicibus for ever. *Co. L. 4. a.*

That *A.* shall have from *Lammas* to *Easter*, *B.* from *Easter* to *Lammas*. *Co. L. 4. a.*

(A 6.)

(A 6.) What shall be a Fee-Simple qualified or conditional.

A fee-simple estate is absolute, or qualified or conditional. *Co. L.*

1. *b.*

As, if land be given to *A.* and his heirs, tenants of such a manor.

*Co. L. 27. a.*

To the king and his heirs, kings of *England.* *Co. L. 27. a.*

To *B.* and his heirs, lords of the manor of *D.* *Co. L. 27. a.*

So, by common law, if a man conveys land to another and the heirs male of his body; this will be a fee-simple conditional. *Co. L.*

19. *a.*

Or, to husband and wife, and the heirs of their bodies. 2 *Inst.* 333.

But a man cannot create a new estate of inheritance: and therefore if a man conveys lands to *A.* and his heirs male, the word, *male*, shall be rejected, and he shall have it to him and his heirs. *Lit. f.* 31.

Or, to *A.* and his heirs female. *Lit. f.* 31.

If he conveys lands in *gavelkind* to *A.* and his eldest heirs, the custom shall not be defeated; for the word, *eldest*, shall be rejected. *Co.*

*L. 27.*

Or, lands at the common law to *A.* and his eldest heirs female of his body; all the daughters ought to inherit. *Co. L. 27. b.*

The grant of the dukedom of *Cornwall* by the king to his son, & *ipsius & heredum suorum regum Anglia filius primogenitis in regno Anglia successuris*, would not have been good if not confirmed by parliament.

*R. 8 Co. 16. The Prince's Case. Co. L. 27. a.*

(A 7.) *What would be a performance of the condition.*] If an estate, at common law, was given to a man and the heirs of his body; by having issue, the condition was performed, and the donee might alien. *Co. L. 19. a. 1 Rol. 840. l. 15.*

So, if an estate was given to a man and the heirs male of his body, the having issue a son was a performance of the condition. *Vide Co. L. 19. a.*

But if an estate was given to a man and the heirs male of his body, who had issue a daughter; the condition was not performed. *Co. L. 19. a.*

(A 8.) *The effect of the condition performed.*] If the condition was performed, he who had the fee-simple conditional, by the common law, might alien his land. *Co. L. 19. a.*

Or, might charge it with a rent, common, &c. *Ibid.*

Or, might forfeit it. *Ibid.*

But tho' the condition was performed by having issue, and the issue inherits, the land does not descend to the heir general: for, if the donee or his issue afterwards dies without issue, the estate reverts to the donor. *Ibid.*

So, if he dies without issue male, where the gift was to him and the heirs male of his body. *Ibid.*

*Vide post. (B 1, &c.)*



## (B) Estate-Tail.

## (B 1.) The Commencement of it.

**A**N estate is said to be entailed, when it is ascertained, what issue shall inherit it. *Lit. f.* 18.

By the common law, all estates of inheritance were fee-simple absolute, or conditional. *Co. L.* 19. a.

But by the *st. W.* 2. 13 *Ed.* 1. 1. the will of the giver according to the form in the deed of gift manifestly expressed shall from henceforth be observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but it shall remain to the issue or revert to the giver, if issue fail.

## (B 2.) What Tenements may be entailed.

And therefore, all lands and inheritances corporeal may be entailed. *Co. L.* 19. b. *Vide Copyhold*, (C 8, 9.)

So, all inheritances issuing out of them, or which concern or are annexed to lands and tenements, or exercisable in land, tho' they cannot be holden. *Co. L.* 20. a.

As, rents, commons, *estovers*, &c. *Ibid.*

The nomination to a church. *Ibid.*

So, offices may be entailed, *Co. L.* 20. a. which concern lands and tenements. 1 *Rol.* 838. l. 4.

As, the office of marshal of *England*. *Co. L.* 20. a. 7 *Co.* 33. b.

The office of serjeant of *C. B.* or chamberlain of the *Exchequer*. *Co. L.* 20. a. *Jon.* 111.

The office of fostership, or the custody of a church. *Co. L.* 20. a. 1 *Rol.* 838. l. 5.

The office of steward, receiver, or bailiff of a manor. 1 *Rol.* 638. l. 10. 7 *Co.* 33. b.

So, a dignity for a baron, &c. is named of some county, town, or place. *Co. L.* 20. a. *R.* 7 *Co.* 33. b. 1 *Rol.* 837. l. 55. *Jon.* 100.

Uses. *Co. L.* 20. a. *R.* 7 *Co.* 33. b.

So, the dignity of baronet; if he be created baronet of such a place. *R.* 12 *Co.* 81.

So, a villein in grofs may be entailed: for he is a thing real. 1 *Rol.* 812. l. 20.

So, charters. *Co. L.* 20. a.

But personal inheritances, or which concern chattels merely, cannot be entailed: as, an annuity. *Co. L.* 20. a. 1 *Rol.* 837. l. 50.

Or, the office of master of the horse, hounds, &c.; for they are merely personal. *Co. L.* 20. a.

Nor, things which do not concern lands or tenements, nor are exercisable in lands or tenements. 1 *Rol.* 837. l. 50.

And therefore, if a baronet be created to him and the heirs male of his body, without mentioning of any place, he shall have a fee conditional in his dignity, which will be forfeited for felony. *R.* 12 *Co.* 81.

So, a lease *per auter vie* cannot be entailed; and if it be limited to one and the heirs of his body, remainder over, the remainder may be

be barred by a surrender, without a recovery. *Cont. 2 Ver. 184. R. acc. 2 Ver. 226.*

(B 3.) By what Words an Estate-Tail shall be created.

An estate-tail ought, regularly, to be limited *to a man and the heirs of his body begotten.*

And therefore, if it be limited to a man *and his issues*, he has it only for life; for the word, *heirs*, is as necessary as to an estate in fee-simple: for all estates tail were fee-simple conditional at the common law. *Co. L. 20. a. 2 Inst. 334. 1 Rol. 837. l. 30.*

So, a gift to a man *& semini suo*, does not make an estate-tail. *Co. L. 20. b.*

Or, to a man *et exitui*, or, *prolibus de corpore suo.* *Co. L. 20. b.*

Or, to the issue male of his body. *1 Co. 103. b.*

Or, to the survivor having issue male, and to the issue male of such issue male. *R. 1 Rol. 837. l. 35.*

So, a gift to a man *and his heirs male*, or, *heirs female*, does not make a tail, but shall be a fee-simple: for it does not limit of what body the heirs ought to issue. *Co. L. 27. a. Lit. f. 31. Vide infra.*

Or, to a man *and his heirs male lawfully begotten.* *R. Co. El. 478.*

Or, to him *and his heirs of the body of his sister lawfully begotten*: for he cannot marry his sister. *R. 1 And. 310.*

Tho' limited by way of use. *1 Rol. 837. l. 30. R. Mo. 424. Cro. El. 478.*

So, the use of a fine to *A. and his eldest son, and the heirs male of the son*, does not make an entail in *A.* *R. 1 Leo. 212. Cro. El. 220.*

So, if he has an express estate for life, he shall not take a tail by implication: as, if a copyhold be surrendered to *A. and B. for life, and for want of issue of B. to D. and his heirs*; *B.* has not a tail: for he had an estate expressly limited for life. *R. Jon. 342.*

But if a man gives an estate-tail to *A.*, remainder to *B. in formâ prædictâ*; *B.* has an estate-tail. *Co. L. 20. b. 1 Rol. 838. l. 35.*

If he had given an estate to *A.*, *and the heirs male of his body*, with a power of revocation, and afterwards revokes, and gives the same estate to *A. and his heirs male*, paying 500*l.*, &c. omitting, *of his body*; it shall be an estate-tail. *R. 3 Lev. 214.*

So, a gift to *A. and B.*, *and one heir of their bodies, and one heir of such heir only*, makes an estate-tail. *Co. L. 22. a. 39 Aff. 20. Qu. Perk. sect. 171. Semb. cont. Pl. Com. 19. b. Semb. acc. Reg. Jud. 6.*

So, a gift to *A. and his heirs, habendum to him and his heirs, and if the donee dies without issue*, that the land shall revert. *1 Rol. 838. l. 45.*

Or, with warranty, to *A. and his heirs, and if he dies without heir of his body, remainder to B.* *R. 1 Rol. 839. l. 5.*

Or, to *A. and his heirs, and if he dies without issue of his body, to B.* *R. 5 Mod. 268. R. 3 Leo. 5.*

So, the words, *of his body*, are not necessary, if there are words tantamount: as, if a gift be to *A. & heredibus de carne sua.* *Co. L. 20. b.*

Or, to *A. & heredibus de se.* *Co. L. 20. b.*

Or, to *A.*, *and the heirs male of the said A. [lawfully begotten].* *R. 7 Co. 41.*

Or, *the heirs which A. de primâ uxore procrearet.* *Co. L. 20. b. 1 Rol. 837. l. 20.*

*Heirs which sibi contigerit. Co. L. 20. b.*

*The heirs by A. procreatis or procreandis. Ibid.*

And *procreandis* extends to issues born before, as well as *procreatis* to issues afterwards. *Ibid.*

To *A. for life, and afterwards to the heirs of A. procreatis or procreandis, and for want of such issue to B.*, shall be an estate-tail. *R. 1 Ch. R. 213.*

[If *A.*, on marriage, settles his estate to the use of himself for life, remainder to his first and other sons in tail-male, remainder to trustees for 1000 years, remainder to his brother *C.* for life, remainder to the heirs of his body hereafter to be begotten; and then declares the trust of the term to be, that if there should be no sons of his marriage, to provide for daughters, by profits, mortgage or sale; with proviso, that if father preferred them in marriage with portions equivalent, or the remainder-man pay them portions equivalent, the term to be void; and the wife dies, leaving no sons, but three daughters; *C.* takes an estate-tail, and the words, *hereafter to be begotten*, take in those born before. *Hebblethwaite v. Cartwright, P. 7 G. 2. C. T. T. 31.*]

[If by articles before marriage, lands are limited to *A.* for life, to *B.* for life, and then to the use of the heir male of *A.* begotten on *B.*, and by settlement (also before marriage) declared to be in part performance of said articles, the lands are conveyed to *A.* for life, and then to the heir male of *A.* on *B.* begotten; to *B.* for life, *A.* has an estate-tail. *Semb. Warwick v. Warwick, H. 1745, 3 Atkyns, 291.*]

So, a gift to *A. and his heirs, and if he dies without heir of his body*, that it revert to the donor. *Co. L. 21. a.*

So, a feoffment to the use of *B.*, and his heirs in perpetuum, and in default of issue of the body of *B.* to the right heirs of the feoffor; *B.* has only an estate-tail: for the use shall be construed according to the intent. *R. Carth. 343. 5 Mod. 267.*

So, sometimes a limitation to the heirs of the body of another makes an estate-tail: as, to *A.*, and the heirs of the body of his father, tho' his father be dead. *Lit. f. 30. Co. L. 27. a.*

To the grandfather, and the heirs of the body of his son. *Co. L. 20. b.*

But, to the son and his heirs of the body of his father, or grandfather, is repugnant and void. *Co. L. 27. a.*

So, a gift to *A. and the heirs of her body by B. her husband (then dead) begotten*; tho' *A.* has it only for life, yet there shall be an estate-tail to the heirs of *A.* by *B.*, and it shall vest in the son of *A.* by *B.*, and upon his death without issue, shall descend to his sister, as heir of the body of *A.* by *B.* *Co. L. 26. b.*

So, an estate for life, remainder to the heirs male of the body of his grandfather; the heirs male of the grandfather all take an estate by way of remainder in tail. *Per three J. four cont. Dy. 156. Dub. Cro. El. 109. 2 Leo. 25. 27. Acc. Co. L. 220. a. R. acc. Cro. Car. 24. Acc. 1 Mod. 226. 237. 2 Mod. 207.*

But if *A.* has a son and a daughter, a gift to the daughter and the heirs female of the body of her father, is void: because she is not heir. *Co. L. 26. Vide post. (B 8.)*

So, by devise, an estate-tail shall be created by words, which are not sufficient for it in a grant. *Vide Devise, (N 5, 6.)*

Or, by act of parliament. *Jon. 105.*

[*A.*, a grandfather, after the marriage of his son *B.*, who had two children



children then living, by deed conveyed lands to trustees to the use of himself for life, remainder to *B.* for life, remainder to trustees, &c. remainder to the use of such child or children of *B.*, and in such shares, &c. as *B.* should appoint, and in default of such appointment, "to the use of all and every the children of *B.*, and the heirs of their several and respective bodies as tenants in common, but if only one such child, to the use of such only child, and the heirs of his or her body;" remainder to the right heirs of *A.* in fee. Then *A.* conveyed the reversion in fee to *C.*; afterwards *B.* had other children, and died without appointing. Held that *B.*'s children took vested interests as tenants in tail, and that on the death of each child without issue, his share fell into the reversion conveyed to *C.* Cross remainders cannot be implied in the construction of a deed. *Tanner v. Dorwell*, *B. R. H.* 34 *Geo.* 3. 5 *T. R.* 518. *Vide supra*, tit. *Devise*, (N 14.)]

[A limitation in a deed to the use of *A.* for life, with remainder to the first son of the body of *A.* lawfully issuing, and for default of such issue, to the second, third, and other sons of *A.*, and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in tail-male to the first son of *A.* *Owen v. Smyth*, *C. P. H.* 36 *Geo.* 3. 2 *H. Bl.* 594.]

(B 4.) Tail-general; what shall be.

Tenant in tail is in two manners: in tail general, or special. *Co. L.* 19. *b.*

Tenant in tail-general is, where lands are given to a man and the heirs of his body, generally, without restriction. *Lit. f.* 14.

Or, to a man, and the heirs male, or female, of his body. *Co. L.* 25. *b.*

(B 5.) Tail-special; what shall be.

Tenant in tail-special is, where the gift is specially restrained to some heirs of his body, and does not go to all the heirs of his body in general: as, if land be given to the husband and wife, and the heirs of their two bodies. *Lit. f.* 16.

[So, if a settlement be made on *J. S.* for life, remainder to his heirs on the body of his wife *A.* to be begotten, the male to be preferred before the female, and the elder before the younger, this is an estate in special tail-male in *J. S.* 2 *Bl. Rep.* 695.]

Or, to *A.* and *B.* (not married) and to the heirs of their two bodies, is a good tail, for the possibility of a marriage between them. *Co. L.* 20. *b.* 25. *b.*

Or, to the husband of *A.*, and the wife of *B.*, and the heirs of their two bodies. *Co. L.* 20. *b.* 1 *Co.* 120. *Co. L.* 25. *b.*

So, if a gift be to *A.* and the heirs male of his body, it is a special tail. *Lit. f.* 21.

Or, to *A.* and the heirs female of his body. *Lit. f.* 22.

Or, to husband and wife, and the heirs male of their bodies. *Lit. f.* 25.

To *A.* and his heirs upon such a wife begotten. *Lit. f.* 29. *R.* 1 *And.* 310.

If a gift be to husband and wife with a limitation to the heirs of their bodies equally, both have an estate-tail. *Co. L.* 26. *a.*

Or,

Or, to husband and wife, and the heirs which the husband shall beget upon the body of his wife. *Lit. f.* 28. *Lane*, 17.

Or, heirs upon the body of the wife by the husband begotten. *R. Yel.* 131. *Vide infra*.

Or, to the heirs of the body of the wife and of the body of the husband. *R. Yel.* 131.

But if it be to husband and wife, and the heirs of the body of the husband; he only has a tail, and the wife for life. *Lit. f.* 26, 27.

Or, to husband and wife, and the heirs of the body of the wife; she has an estate-tail, and the husband for life. *R. 2 Cro.* 475.

Or, to the heirs of the body of the wife by the husband begotten. *Lit. f.* 28. *Dub. Lane*, 17. *Vide supra*.

Or, the heirs of the body of the wife by the husband and B. begotten. *Yel.* 131.

Or, to husband and wife for life, and afterwards to the heirs of the body of the wife by the husband begotten. *R. Yel.* 131. *Vide supra*.

Or, to the heirs of the body of the husband upon the body of the wife begotten; the husband only has the tail. *R. Hob.* 84.

So, if it be, to the heirs of the husband *de corpore sua super corpus* of the wife. *Hob.* 84.

So, a gift to husband and wife, and the heirs of the body of the survivor, gives a tail only to the survivor. *Co. L.* 26. a.

[But if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the estate-tail vests in the wife only. 2 *T. R.* 431.]

A gift to two husbands and their wives, and the heirs of their bodies, makes a joint estate for life with several inheritances, viz. of a moiety to one husband and wife and their issue, the other moiety to the other husband and wife and their issue. *Co. L.* 25. b.

So, a gift to B. and two women, or *vice versa*, makes a joint estate for life, with several inheritances to each. *Co. L.* 25. b.

#### (B 6.) Gift in Frank-marriage.

A gift in *frank-marriage* is, when a man gives lands or tenements to a man with his daughter, or other of his blood, in *frank-marriage*. *Lit. f.* 17.

So, if a gift be to A. *habendum in liberum maritagium cum filiâ suâ*; so that the woman is only named after the *habendum*. *Co. L.* 21. a.

So, if a gift be to A. *in liberum maritagium B. filiæ*, without saying, *cum filiâ*. *R. Ow.* 26. *Godb.* 18.

So, a gift to a woman with a son in *frank-marriage* is good. *Co. L.* 21. b.

So, a gift after marriage, as well as before. *Co. L.* 21. b. *R. Godb.* 19.

And a gift to a man with a widow, as well as with a virgin. *Co. L.* 21. b.

So, the gift shall be good, tho' a remainder be limited to a stranger in tail, if the reversion be to the donor. *Godb.* 20.

Every inheritance which lies in tenure may be given in *frank-marriage*: as, lands and tenements, in reversion, as well as in possession. *Co. L.* 21. b.

A rent-service, charge, or feck. *Co. L.* 21. b.

If a gift in *frank-marriage* takes effect, it shall not be destroyed, tho' the donor afterwards assigns the reversion. *Godb.* 20.

By a gift in *frank-marriage*, the donees have an estate in special tail to them and the heirs of their bodies begotten, without other words. *Lit. f.* 17. *Godb.* 19.

And the donees hold freely of the donor till after the fourth degree. *Godb.* 19. *Lit. f.* 19. *Vide Co. L.* 21. b.

And therefore, if a rent be reserved upon the gift, it does not take effect till the fourth degree past. *Co. L.* 21. b. 1 *Rol.* 840. l. 45.

But a gift without the word, *frank-marriage*, is not supplied by any words tantamount; as, if it be given in *connubio ab omni servitio soluto*. *Co. L.* 21. b.

So, if *liberum* only be omitted. *Per Dy. Godb.* 19.

So, a gift in *frank-marriage* is not good, if it be not with some of the blood of the donor. *Co. L.* 21. b. *Godb.* 19.

Or, if it be of a thing which lies not in tenure. *Co. L.* 21. b.

Or, if the tenure be not of the donor; and therefore, a gift in *frank-marriage*, the reversion to a stranger, passes only an estate for life. *Co. L.* 21. b. *Godb.* 20.

So, if the reversion was limited to themselves. *Co. L.* 21. b. 1 *Rol.* 840. l. 50.

So, before the *st.* 27 *H.* 28. *cestuy que use* could not make a gift in *frank-marriage*; because the reversion was in the feoffees. *Co. L.* 21. b.

So, a gift in *frank-marriage* cannot be by devise; for there is no tenure created. *Co. L.* 21. b.

(B 7.) Issue in Tail; how he takes.

The issue in tail does not take by descent only; but by the *st.* *de Donis* as well as by descent, and is in *per formam doni*.

(B 8.) *He takes per formam doni tho' he be not heir.*] So, if land be given to B. and the heirs female of his body, who has a son and a daughter, the daughter shall inherit *per formam doni*, tho' the son be heir. *Co. L.* 24. b.

But, regularly, such special heir shall not take by purchase, where he is not also heir general: as, if there be a lease for life, remainder to the heirs female of the body of B., who has issue a son and a daughter, the daughter shall not take: for she ought to be heir, as well as heir female. *Co. L.* 24. b. *Hob.* 31.

So, if a remainder be to the heirs male of the body of B. who has two sons, and the eldest has issue a daughter and dies; the youngest son cannot have the remainder. 1 *Co.* 95. b. 103.

So, a devise in tail; remainder to the right heirs male of him and of his name; his brother shall not take, if there be a daughter who was heir general. *R. Hob.* 31. 2 *Rol.* 416. l. 30.

Yet sometimes, where there is a particular description, or designation, of the person to whom the remainder is limited, such special heir shall take, tho' there be another heir general: as, where a man takes notice by his will, that he has daughters, yet devises land to his heir male; the son of his brother shall take. *Cited 1 Vent.* 381.

So, a devise to his eldest son and the heirs male of his body, remainder



mainder to the heir male of the devisor, and his heirs of his body; a son of the devisor by a second venter shall take the remainder. *R. Cro. Car. 24.*

A devise to the heir male of the body of his great-grandfather; the person who is issue male shall take, tho' there be a daughter who is heir general. *Per Cowper, 11 Feb. 3 Geo. in Chanc. inter Newcomen and Berkham.* But this was in execution of a trust. *Eq. Ca. 117. (Vide 2 Ver. 729.)*

So, where a purchase is by deed: as, if *B.* covenants to stand seised to the use of his heirs male upon the body of *A.* his wife begotten; a son by *A.* his second wife shall take the remainder, tho' there be an heir by the first venter. *R. per Hale and Wyld, 1 Vent. 381. Pibus and Mitford.*

(B 9.) *Must convey his descent wholly thro' males, &c.]* But an estate-tail to a man and the heirs male of his body shall descend to him, who can convey his descent wholly thro' heirs male: as, if he has issue a daughter, who has issue a son; the son shall not inherit by force of the entail. *Lit. f. 24.*

So, if tenant in tail to him and the heirs female of his body, has issue a son who has issue a daughter; the daughter shall not inherit. *Co. L. 25. a. 2 Ver. 409.*

So, if *B.* has an estate to him and the heirs male of his body, remainder to him and the heirs female of his body, and he has issue a son, who has issue a daughter, who has issue a son; the son of the daughter shall not inherit to either entail. *Co. L. 25. b.*

So, if an estate-tail be by devise; for that does not alter the nature of the descent. *Co. L. 25. a.*

#### (B 10.) A Reversion.

(B 10.) *What shall be.]* In every gift in tail, the reversion of the fee-simple, without saying more, is in the donor. *Lit. f. 19. Vide Copyhold, (C 12.)*

The reversion is the residue of the estate continuing in him, who made the particular estate. *Co. L. 22. b.*

Upon a gift in tail, by operation of the *β. W. 2. 1. de Donis*, the possibility of reverter is turned to a reversion in the donor. *Co. L. 22. a. 2 Inst. 335.*

So, upon a lease for life or years, the lessor has the reversion continuing in him. *Co. L. 22. b.*

So, upon an extent by statute-merchant, staple, recognizance, or *elegit*, a reversion is left in the conusor. *Co. L. 22. b. Vide Statute Staple (C).*

So, since the *β. 27 H. 8. 10.* if a man makes a feoffment to the use of *B.* for life or in tail, and afterwards to the right heirs of the feoffor; the reversion is in him; for the use was continuing in him, and the statute executes the possession to the use. *Co. L. 22. b. Vide Discent (A).*

Or, to the use of himself for life or years, and afterwards to *B.* for life, and afterwards to his right heirs; the feoffor has the reversion in him. *Co. L. 22. b. R. 3 Lev. 406. R. Sal. 591.*

So, if husband and wife levy a fine to the use of the husband for life,

life, remainder to *A.* for life, remainder to the right heirs of the husband; the husband and *A.* die in the life of the wife; she shall have it, and not the heir of the husband: for it was a reversion, and not a remainder. *Cont. per three J. but Ch. J. Dy. and Ch. B. acc. Dy. 237. b.*

But if a man leases land for years, there is not a reversion till the lessee enters, or the lessor waives the possession. *Co. L. 46. b.*

So, if a feoffment be to the use of the feoffor in tail, and afterwards to the feoffee and his heirs; the feoffee has not a reversion, but a remainder. *Co. L. 22. b.*

So, if a grant be of a prebend, donative, hospital, &c. no reversion remains: for the prebendary, &c. has the whole estate, tho' upon his death it remains in the patron. *R. Ca. Ch. 214.*

(B 11.) *Of what account.]* A reversion upon an estate-tail is of no great account, for it may be docked by a common recovery.

(B 12.) *By what words it passes.]* If a man grants *the reversion of his land*, that is sufficient to pass his reversion.

So, if he grants *the land itself*, the reversion passes: for when he grants the land, it cannot be intended that he would not grant his reversion. *R. 10 Co. 107. a. D. Vau. 83. Pl. Com. 433. b.*

By a grant of *a reversion*, fealty passes as incident; for it cannot be severed. *Co. L. 143. a.*

So, a rent passes, if it be not excepted; for it may be severed. *Co. L. 143. a. Vide Rent, (C 5.)*

But if *A.*, reciting a lease by his father, (which is void as to him,) grants his reversion of the same land after the end of the former lease to another for years, his grant is void; for he had not the reversion. *R. Jon. 355.*

So, by the grant of *a reversion*, land in possession does not pass. *R. 10 Co. 107. b. R. Cro. Car. 400. D. Vau. 83.*

Nor, by the grant of *a reversion and other the premises*; for that cannot be understood of the same premises, of which the reversion was mentioned before. *R. Cro. Car. 400.*

Nor, by the grant of *a reversion, habendum the land*; for the *habendum* does not enlarge it. *Pl. Com. 150. Cro. Car. 400.*

### (B 13.) A Remainder.

(B 13.) *What shall be a good one.]* So, by a construction upon the *st. W. 2. 1. de Donis*, a remainder may be limited upon an estate-tail. *Vide Copyhold, (C 11.)*

A remainder is the remnant of an estate in land, depending upon a particular estate, and created with it. *Co. L. 49. a. 143. a.*

As, if a man makes a gift in tail, remainder to another in tail, or in fee.

Or, makes a lease for life, or years, remainder to another for life, in tail, or in fee.

And such remainder shall be good without deed; for it passes by the livery made for the particular estate; for the remainder and the particular estate make but one estate to many intents. *Co. L. 143. a.*

So, he may give an estate to *A.* for life, remainder to *B.* in tail, and

and if *B.* dies without issue, to another for years, &c.; this estate for years shall be good after the death without issue. *R. 1 Sid. 102.*

So, there may be a remainder for years after a prior term for years. *Ray. 142.*

So, there may be a remainder of a rent created *de novo*. *Cont. per Montagu, Pl. Com. 35. a. Adm. acc. Dy. 311. a. 4 Mod. 280. Mod. Ca. 112, R. 1 Sid. 285. R. Sal. 577. R. Mod. 30.*

And it is sufficient, that the remainder vests during the particular estate, or *eo instante* that the particular estate determines: as, if there be a lease for life, remainder to the right heirs of *B.*, or the first son of *B.*, &c. if *B.* dies or has a son in the life of the lessee, the remainder will be good. *Pl. Com. 29.*

So, if a rent be granted to *B.* for the life of *C.*, remainder to the right heirs of *C.*, it shall be good; for it vests *eo instante* that the estate of *B.* determines. *Co. L. 298. a.*

So, if an estate be granted to *A.* for life, and if such a condition be performed, that *B.* shall have it; if the condition be performed in the life of *A.* the remainder will be good. *Pl. Com. 27. 29.*

So, if a remainder be limited to a person incapable, as a monk, &c. if he becomes capable before the particular estate determines, it is sufficient. *Pl. Com. 27. b. [Note, the book is cont.]*

So, if the particular estate be to a *non compos*, who makes a surrender; for his surrender is void. *R. Sal. 577. (Com. 45.)*

So, it is sufficient, if the remainder vests during the continuance of the particular estate, tho' there be an alteration of the estate, if it be not totally merged or destroyed: as, if lessee for life grants over his estate before the remainder happens; for the estate of the grantee supports the contingent remainder. *Per Wyndh. Ray. 30. Pol. 90.*

So, if lessee for life, remainder to *A.* for life, remainder to the first issue of *A.*, remainder to *B.* in tail, leases for years to *A.* who joins with *B.* in a fine and feoffment; the contingent remainder to the first issue stands good: for the estate of the lessee for life supports it. *2 Rol. 794. l. 5.*

So, if a particular estate be to two for life, and one joint-tenant releases to the other. *R. per three J. Dolb. cont. Ray. 413. 1 Vent. 345. 2 Jon. 136.*

Or, to *A.* for life, remainder to his first son in tail, remainder to *A.* in fee; tho' the fee be executed, the remainder is not destroyed. *Pol. 90.*

So, if lessee for life, &c. be disseised: for a present right of entry is sufficient to support a contingent remainder. *D. 1 Vent. 189. Per Holt, M. 9 W. 3. inter Thompson and Leach, Salk. 577. 1 Co. 66. b. 135. b. Semb. Pol. 98. (Com. 45.)*

So, if tenant for life, remainder to his wife for life, remainder to *B.*, remainder to the eldest son of *B.*, makes a feoffment; the remainder to the eldest son is not destroyed; for by the feoffment the estate of the husband and wife shall be lost, by which *B.* has a present right of entry. *R. 2 Rol. 796. l. 35. 794. l. 5. 797. l. 5. Semb. Pol. 376. 381.*

And tho' the lessee, who has a present right, does not enter during his life, yet the first feoffees may enter after his death to revive the contingent estate. *R. 2 Rol. 797. l. 20.* Or, rather the issue himself. *Pol. 395.*

Otherwise,



Otherwise, if the feoffees, after the contingency happened, release their right, or by feoffment or otherwise bar their entry. *R. 2 Rol. 797. l. 40. Semb. cont. Pol. 383.*

So, if there be tenant for life, remainder to his first son in tail, remainder to *B.* for life, remainder to his first son in tail, &c. and if *B.* grants by fine to the tenant for life, who has a son born, and then makes a feoffment; for the right of the son born is sufficient. *R. 1 Vent. 189. 2 Lev. 35.*

So, it is sufficient, tho' the particular estate be once merged or destroyed, if it be revived before the remainder happens: as, if lessee for life, upon which a contingent remainder is limited, makes a feoffment upon condition, and enters for the condition broken, before the contingency happens. *Per Holt, M. 9 W. 3. inter Thompson and Leach. Semb. cont. per Hale, 2 Sand. 387. (Vide Salk. 577. Com. 45.)*

If lessee for life, remainder to his wife for life, remainder to another upon a contingency, makes a feoffment, and dies, and his wife enters before the contingency happens: for this brings back the estate of the wife for life, and the contingent use also. *Semb. 2 Rol. 796. l. 50. Acc. 2 Rol. 797. l. 15. 30.*

So, if the lessee for life be attainted for treason, whereby his estate is vested in the king; the first son born before or after the attainder shall have it: for the estate of the wife was sufficient to support the contingent remainder to the son. *R. Sal. 576.*

So, if *B.* after a son born, with him in fee, conveys to *A.* who makes a feoffment, and then *B.* has another son, and the first son dies; the right of entry in the first son is sufficient. *R. 2 Lev. 35.*

So, it is sufficient if the remainder vests, tho' the particular estate be afterwards defeated: as, if the lessor disseises the lessee for life, and afterwards makes a feoffment to the use of *B.* during the life of the lessee, remainder to *A.*, and the lessee enters upon *B.*, whereby his estate is defeated; yet the remainder to *A.* stands good. *Co. L. 298. a.*

So, if a lease be to an infant for life, remainder to *B.*, and the infant at full age disagrees; yet the remainder is good. *Co. L. 298. a. D. 1 Sid. 360.*

So, where a remainder is limited to a person certain and known, tho' it takes effect only upon a contingency, yet it stands good, tho' the particular estate be destroyed: as, a devise to an eldest son for life, and if he does not pay annuities, &c. to the youngest son; if the eldest son makes a feoffment, and afterwards fails in payment of the annuities, &c. the youngest son may enter. *R. 2 Rol. 793. l. 45.;* for it is not like an use in remainder. *Ibid.*

A devise to *A.* for life, remainder to the eldest son of *A.* and the heirs of his body; if *A.* dies, his wife *privement enseint* with a son, the son shall have it after his birth. *R. cont.; but the judgment was reversed in Parliament. 4 Mod. 285.*

[If *A.* seised of the reversion of lands settled on his son *B.*'s marriage, devises them on failure of issue of *B.*, and for want of heirs male of his own body, to his daughter *F.* and the heirs of her body; *F.* takes nothing, the devise being void in its creation, as being in too remote a contingency. *Per the Judges in Parliament. Lady Langbrough v. Fox, P. 6 G. 2. C. T. T. 262.]*

[If lands are limited to *A.* for 99 years; if he so long lives, and from

from the death of *A.* or other sooner determination of the estate limited to him for 99 years, to trustees and their heirs during the life of *A.* on trust to preserve contingent uses and estates, and after the end, or other sooner determination, to the use of the first and other sons of *A.* in tail-male, like remainder to *B.*, to *C.*, and the last remainder to *D.*, for 99 years, if he so long live, remainder to trustees as above, and to the first and other sons of *D.* in tail-male; these limitations to the first and other sons of *D.* are good remainders. *Smith v. Packhurst. Opinion of the twelve Judges in the House of Lords, 1742, 3 Atkyns, 134.*

[If the wife's estate be settled on herself for life, remainder to the husband for life, if any issue of the marriage so long live, remainder if the wife die without issue, of one moiety to him in fee, and of the other to her relations. His remainder in fee does not arise, unless he survives his wife. 1 *Bl. Rep.* 638.]

[If a man devises lands to *B.* and his heirs, to the use of *B.* and his heirs, in trust to pay debts, then in trust for his grand-daughter *C.* and the heirs of her body, remainder to *B.* in fee, on condition that he marry *C.*; this remainder is a legal and not a trust estate in *B.* *Robinson v. Comyns, H. 9 G. 2. C. T. T. 164.*

[If a man devises his real estate to trustees, and their heirs, to the use of them and their heirs, *upon several trusts hereinafter mentioned*; these words are declaratory of his intention, and the legal estate in the trustees shall support the limitations as contingent remainders. *Hopkins v. Hopkins, H. 1738, 1 Atkyns.*

[If the trusts are, in trust for *A.* only son of *B.* (testator's heir-at-law) for life, then to the first and other sons of *A.* and the heirs male of their body, and for want of such issue, then if *B.* have any other son, for them in like manner, and for default then for the first and other sons of *S.* eldest daughter of *B.*, and so of his other daughters; and for default, then for the first and other sons of *H.* in like manner, and other remainders, and remainder to testator's right heirs, with a proviso that none of the persons shall be in actual possession till 21, the trustees in the mean time to allow maintenance, and the surplus to go to those entitled thereto; *A.* dies before the testator, *B.* has another son *W.* born after testator's death, who also dies. The eldest son of *H.* of full age shall not have a settlement made on him in possession by the trustees, nor the surplus profits which accrued during *W.*'s life, nor shall any conveyance be made of the estate, but it shall remain in the trustees' hands, to see whether *B.* or any of his daughters will have a son of 21; for so long there are trusts to be preserved, and no *cestui que trust* till then is to come into possession. *Ibid.*]

(B 14.) *What not, if it be not supported by a particular estate.*] But a remainder cannot be created without a particular estate: as, if an heir endows his mother, remainder to *A.* in fee. *Pl. Com.* 25. *b.*

Tho' it be by way of an use: as, if husband and wife, seised in right of the wife, levy a fine, and declare the uses to the heirs of the body of the husband upon his wife to be begotten. *R. 4 Mod.* 155. *Ca. Parl.* 105. *Skin.* 351. *Vide Uses, (B 2.—K 7.)*

So, if a particular estate is void in its creation, the remainder limited upon it is also void: as, if a lord grants his seigniority to the terre-

terre-tenant for life, remainder over; the remainder is void: for the feignory granted to the terre-tenant was extinct. *Dy.* 140. *b.*

So, if a rent-charge be granted to a terre-tenant for years, remainder over; the remainder is void: for, by the grant to the terre-tenant, the rent is suspended at the commencement. *2 Rol.* 415. *l.* 20.

If a lessor confirms the estate of the lessee for life, remainder in fee. *Pl. Com.* 25. *b.*

Or, disseises him, and afterwards makes a new lease to him for life, remainder in fee: for the lessee is remitted. *Pl. Com.* 25. *b.*

So, a grant to a person incapable, as to a monk, &c. remainder over, is void. *2 Rol.* 415. *l.* 25. *Pl. Com.* 35. *a.*

Or, to a person not *in rerum naturâ*, for life. *2 Rol.* 415. *l.* 27.

Otherwise, if a devise be to a monk, a person not *in rerum naturâ*, &c. for life, for the remainder over shall be good. *2 Rol.* 415. *l.* 30. *Vide Devise*, (N 19.)

So, if the particular estate be only for years, remainder to the right heirs of *B.*, it is void: for a freehold cannot be in abeyance. *R.* 1 *Co.* 130. *a.* 134. *b.* 135. *a.* *Mo.* 720. 3 *Co.* 20. *Ray.* 83. *Poph.* 4.

So, a devise to *A.* for 50 years, remainder to the heirs males of the body of *A.*, will be a void remainder. *R.* 4 *Mod.* 259. 1 *Sal.* 226. *Skin.* 408.

Or, to *A.* for 50 years if he so long live, remainder to his first and other sons, remainder to *B.* *R.* *Mo.* 488. *R.* *Sal.* 229. *Semb.* 2 *Ver.* 131. 372.

Or, to *B.* for years, remainder to the right heirs of *B.* *Per two J.* 4 *Leo.* 21.

Yet, a remainder for years, after a term for years, will be good; for it may be in abeyance. *Ray.* 142.

So, a devise for 15 years, remainder to the first son of *B.*, shall be good: for the law aids him *qui est inops consilii*. *Ray.* 83. *Vide Devise*, (N 16.)

(B 15.) Or, the particular estate be destroyed before the remainder be vested.] So, if the particular estate be merged or destroyed before the remainder vests, it never can vest: as, if tenant for life, remainder to the right heirs of *B.*, or upon other contingency, remainder to *D.* in fee; if *D.* dies, and his estate descends to the tenant for life, whereby his estate is merged before the contingency happens; the remainder never vests. 1 *Co.* 135. *b.*

So, in any case, where the reversion descends upon the particular estate, and drowns it before the contingency happens. *R.* by all the Judges except *Fleming*. 2 *Cro.* 260. 1 *Bul.* 61. *Per Holt*, 2 *Sand.* 386. *Argo.*

So, tho' the reversion descends upon a particular estate, with a contingent remainder, created by devise; except when it may take effect as an executory devise. *R.* 2 *Cro.* 260. *R.* 2 *Lev.* 202.

So, if the particular estate be merged in the reversion by the surrender of the tenant.

Or, determined by the death of the tenant. *R.* 1 *Sal.* 238.

Or, by the death of tenant in tail without issue. 2 *Leo.* 70.

Tho' the estate was created by devise. *R.* 2 *Leo.* 70. *Mo.* 371.

So, if the particular estate be destroyed before the contingency happens, by the act or wrong of the tenant: as, if tenant for life, remainder to his right heir in tail, remainder in fee to tenant for life,



makes a feoffment, or levies a fine, whereby his estate for life is gone. *R. 1 Co. 66. b. R. Cro. El. 630. 1 Co. 135. b. R. Mo. 545.*

So, if tenant for life be attainted for treason, or felony. *R. Mo. 815. Semb. Sal. 576.*

So, if there be tenant for life, remainder upon a contingency, remainder in tail, and tenant for life joins with the remainder-man in tail in a fine; tho' each passes only that which he lawfully may, the remainder is lost. *Per Hale, 2 Sand. 386.*

So, if tenant in tail, remainder to the right heirs of *B.*, makes a feoffment in the life of *B.*, the remainder never can vest. *1 Co. 135. b.*

So, tho' the act which destroys the particular estate be voidable; as, if a *feme-covert* be tenant for life, and the reversion is granted to her and her husband; tho' she may afterwards waive it, the contingent remainder depending thereon is gone. *R. 2 Sand. 387. 2 Lev. 39.*

So, if tenant for life be *non compos*, and makes a surrender to him in reversion; if his surrender is not void, but only voidable. *R. M. 9 W. 3. inter Thompson and Leach, Sal. 576. (Com. 46.)*

So, if an estate be to husband and wife for life, remainder to the heirs of the survivor, and the husband alone makes a feoffment, and dies; the remainder is gone, tho' the wife might avoid the feoffment *eo instante* that the contingency happens. *R. Cro. Car. 102. Vide 2 Rol. 796. l. 45. But Holt said that it was a nice case, M. 9 W. 3. inter Thomson and Leach. (Com. 46.)*

So, if tenant for life makes a feoffment upon condition. *Per Holt, M. 9 W. 3. (Com. 46.)*

Tho' the condition be broken before the contingent remainder happens: for a bare title of entry is not, tho' a present right of entry is sufficient to support a contingent remainder. *Per Holt, M. 9 W. 3. (Com. 46.)*

Tho' the particular estate be revived after the remainder first attached; as, by entry for a condition broken, &c. *Per Hale, 2 Sand. 387. Per Holt, M. 9 W. 3. Sal. 577. (Com. 46.)*

[Where a tenant for life levies a fine, tho' it is no bar to those in remainder; yet it seems that a remainder-man must make an actual entry, before he can maintain an ejectment; and where an entry is necessary, the demise must be laid after it. *Doe v. Hicks, B. R. M. 38 Geo. 3. 7 T. R. 433.*]

[Neither can he maintain an action for the mesne profits before such entry. *Compere v. Hicks, B. R. T. 38 Geo. 3. 7 T. R. 727.*]

*Vide Claim, (B 3.)*

So, if a remainder to a person *in esse* be contingent, because it commences after a contingent fee to another not *in esse*; if by fine, &c. the particular estate be destroyed before the other comes *in esse*, the remainder *in esse* cannot take effect. *R. 1 Sal. 224.*

So, a future right of entry is not sufficient to support a contingent remainder. *Dub. 1 Vent. 189. Per Holt acc. M. 9 W. 3. inter Thompson and Leach. (Com. 46. Sal. 577.)*

As, if an estate be limited to *A.* for life, and afterwards to his wife for life, remainder to the first son of *B.*, &c. If *A.* makes a feoffment before *B.* has issue, the contingent remainder is destroyed: for the feoffment by *A.* passes his estate and the remainder to the wife during the coverture; and so no right of entry was in him during the coverture. *Semb. 2 Rol. 796. l. 45.*

If

If *A.* be disseised, and a descent cast, and five years passed, by which the entry is tolled. *Sal.* 577.

So, if the freehold be gone, or defeated before the remainder upon it vests, tho' a particular estate for years remains: as, if a feoffment be to the use of *A.* for years, remainder to *B.* in tail, remainder to the right heirs of *A.* If *B.* dies without issue in the life of *A.*, the remainder to his right heirs is void. *R. 2 Rol.* 791. *l.* 50.

So, if a particular estate by devise, &c. be destroyed by the wrongful act of the tenant before any remainder vests, the wrongful estate never can be made void but by the right heirs of the devisor. *1 Sal.* 224, 5.

[By *Stat. 10 & 11 W. 3. c. 16.* a posthumous child, born after the next rent day after the father's death, is entitled to the intermediate profits of lands settled, as well as to the lands themselves. *Basset v. Basset*, *M.* 1744, 3 *Atkyns*, 203.]

(B 16.) *What remainder shall be contingent.*] If a remainder be limited to commence upon a contingency, which perhaps will not be before the particular estate determines, the remainder will be contingent, and does not vest immediately: as, if a lease be to *A.* for life, remainder to the right heirs of *B.*; for perhaps *A.* may die before *B.*, and then the remainder will never take effect. *3 Co.* 20. *a.* *Pol.* 56. *Vide Devise*, (N 16, 17.)

[Where a testator uses the words, "in case," the court must hold that he had some contingency in contemplation. *Hodges v. Middleton*, *B. R. T.* 20 *Geo.* 3. *Dougl.* 433.]

[A remainder is not construed to be contingent, where it can be taken for vested; because the latter tends to support the estate, the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by a fine or feoffment. *Ives v. Legge*, 3 *T. R.* 489. *in notis.*]

[All contingent remainders may be reduced to two heads; 1st, Where a remainder is limited to a person not in being, who may possibly never exist; as, if an estate is limited to *A.* for life, remainder to his first son, when he has no child; and 2dly, Where a remainder depends on a contingency collateral to the continuance of the particular estate; as, if an estate is limited to *A.* for life; and after the death of *J. S.*, or after *J. S.* shall come from *Rome*, to *B.* in fee. *Smith v. Packhurst*. *Opinion of the twelve Judges in the House of Lords*, 1742, 3 *Atkyns*, 134.]

[If *A.* devises to his wife for life, then to such child as she is with child of, this is a contingent remainder, tho' the wife is not with child. *Gulliver v. Wicket*, *M.* 19 *G.* 2. *Wilson*, 105.]

[So, an estate made by *A.* to *B.*, whom he intends to marry, and to the heirs of their two bodies begotten, is an estate for life to *B.*, with a contingent remainder to the issue; and therefore if the father survive his wife, he may bar the remainder to the issue. *2 Bl. Rep.* 728.]

A lease to *A.* till his full age, remainder to *B.* It will be a contingent remainder. *R.* 3 *Co.* 20. *a.*

A lease to *A.* for life, remainder to *B.* for life, and if *B.* dies before *A.*, remainder to *C.* 3 *Co.* 20. *a.*

A feoffment to *A.*, to the use of *B.*, for the life of *C.*, and if *B.* and *C.* die, remainder to *D.* The remainder is contingent. *Lane*, 22.

A devise to *A.* for life, and if he shall have issue male, to such issue; if he shall not have them, to *B.* *Semb.* 3 *Lev.* 434. *R.* 1 *Sid.* 47. *Ray.* 28.

A lease to *A.* for life, and if *B.* pays so much, remainder to the right heirs of *B.*: for perhaps *B.* will not pay during the life of *A.* *Pol.* 57.

Or, after the death of *A.* and *C.*, to *B.*: for perhaps *A.* may die before *C.*; and the remainder cannot commence till the death of both. *R.* *Pol.* 57.

A lease for 40 years if *A.* so long lives, remainder, after the death of *A.*, to another, is contingent. *Ray* 144. *Pol.* 67. 2 *Ver.* 131.

To husband and wife for life, and afterwards to the heirs of the survivor. *Co. L.* 26. *a.*

So, if a remainder commences upon an act, which determines the particular estate: as, if a lease be to *A.* till his return from *Rome*, and after his return to *B.*; the remainder to *B.* is contingent. *R.* 3 *Co.* 20. *a.*

So, if a remainder commences after a contingent fee, it cannot be vested, but contingent: as, a devise to *A.* for life, and if he has issue male, to him in fee; if he has not, to *B.* in fee: the remainder to *B.* is contingent. *R.* 1 *Sal.* 224.

[If a man devises lands to his daughter for life, then to her first and other sons in tail, then provides portions for younger children, then devises to trustees, then gives them power to receive the rents till she is 21, and lay them out in purchases to the same uses; and then says:—"In case my daughter departs this life without issue of her body living at her death," he gives his lands to trustees till *A.* attains 21, then a continuation of the power to receive and lay out rents, then "I give my lands to the said *A.* after he shall attain 21, for life, limitation to sons, limitation to daughters; and in default, or "if *A.* dies before 21, and without issue, then to *B.* for life, without impeachment, remainder to first and other sons, remainder to "C. for life without impeachment, remainder to first and other sons; "and for default, then, &c.:" all the limitations are limitations to the trustee, in case *A.* should die before 21, and contingent only during his minority; and after he attains 21, his remainder and all the subsequent limitations, are vested remainders. *Lethicullier v. Tracy*, *M.* 1753, 3 *Atkyns*, 774.]

[*A.* devises lands to his son for life, then to the heirs male or female lawfully begotten of the sons body for ever, they paying out of the same, &c.; if not paid, then to *B.* till paid, and then to return to the sole use of the heir male or female begotten by the son, and to his or her heirs for ever; if son dies without issue, then to *B.* This remainder to *B.* is a contingent, not vested, remainder, the remainder to the heirs of the body of the son being a good contingent remainder. *Doe v. Holmes*, *T.* 11 *G.* 3. 3 *Willf.* 237. *M.* 12 *G.* 3. 3 *Willf.* 241. 2 *Bl.* 777. See also, 1 *Ld. Raym.* 203. 1 *Salk.* 224. 3 *Lev.* 431. *Dougl.* 264.]

But there cannot be a remainder for years in contingency: for every lease for years enures by way of contract. *Ray.* 151.

[If a man devises all his estates to trustees, their heirs, &c. to pay his son *B.* an annuity, and if he has any children, the residue of the rents during *B.*'s life for their education, and after *B.*'s death a moiety



moiety of trust estate to such children as he shall leave, their heirs, &c. the other moiety to the children of *C.*, and every other child of his daughter *S.*, their heirs, &c. and if *B.* dies without issue, the first moiety to *C.* and other children of *S.*, their heirs, &c. and directs annual payment to such wife as *B.* shall marry; testator dies, *B.* marries, has issue a son and daughter, and dies; *C.* marries, has issue a daughter, and dies; the limitation is well supported by the estate in the trustees; and if it was not, it would be good as an executory devise. The profits between the testator's death and the birth of *B.*'s first child go to his children. *Chapman v. Blisset*, *M. 9 G. 2. C. T. T. 145.*]

(B 17.) *What shall be vested.*] But if a remainder be to commence upon a thing casual, but certain in the event, tho' it be expressed that it shall not commence till the casualty happens, the remainder shall be vested, and is not contingent: as, if a lease be for years if *B.* so long lives, remainder, when *B.* dies, to *D.*: for it is certain that *B.* must die, and the words, *when B. dies*, denote the time when the remainder shall take effect in possession. *Pl. Com. 33. a. Vide Devise*, (N 18.)

So, a lease for life or years, remainder after the death of the lessee, or end of the term, to *B.* 3 *Co. 21. a. Cro. El. 450. 585.*

A gift to *A.* and the heirs of his body, and if it happens that he dies without issue, remainder to *B.*; the remainder vests immediately. *Hob. 30, 31.*

A devise to *A.* in tail, and after his death, without issue, to *B.*, and if *B.* dies without issue, *A.* not being alive, to *C.* in fee; the remainder to *C.* is vested; for the words, *A. not being alive*, import nothing but what was implied. *R. 1 Sal. 233.*

So, if a fine or feoffment be to *A.*, till he comes back to *England*, and attains his full age, or dies, and after his return and full age, or death, remainder to *B.*; the remainder vests immediately: for it is of necessity that he will do the one thing or the other: for he will come back or die. *Semb. 1 Leo. 244. Cro. El. 269.*

So, if a lease be for 99 years, if *A.* lives so long, and after the death of *A.*, to *B.* in fee; the remainder will be vested: for it shall not be intended that *A.* may survive the term. *R. Pol. 67.*

So, if a remainder commences upon a contingency, which does not denote a condition precedent, but the time of the commencement of the estate: as, a devise to *A.*, and afterwards to his 1st, 2d, 3d, and 4th sons in tail, and if the fourth son dies without issue, to *B.*; he shall take tho' *A.* has no son. *R. Mo. 487.*

So, a devise to *A.* for life, if she does not marry; and if she marries, to *B.* in tail, &c. the remainder to *B.* is vested, and not contingent: for the devise to *A.* was during her widowhood, and the limitation to *B.* if she marries, was tantamount as upon determination of her estate. *R. Ray. 428.*

So, a devise to *A.* for life till he aliens, and then to *B.*, &c. *R. Mo. 487.*

Or, till he discontinues, &c. *R. 2 Cro. 697. Jon. 57.*

So, if a remainder be limited to a person *in esse*, after a contingent estate for life, or in tail, it shall be vested. 1 *Sal. 224.*

[Devise to the testator's seven sisters, share and share alike; on the death of any of them, her share to go to her first and other sons

in tail male; and for *default of such sons*, to her daughters as tenants in common. In case of any of the seven sisters dying without issue, or such issue dying under twenty-one, the surviving sisters to take her share; and if all the sisters should die without issue, or such issue die under twenty-one, then over. It was holden that the words, "for *default of such sons*," did not make the remainder to the daughters contingent, which took effect notwithstanding the birth of a son, who died without issue. *Dacre v. Dacre*, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 250. B. R. H. 39 Geo. 3. 8 T. R. 112. S. C.]

[If there is a remainder to children by settlement or will, it is not material whether they are then alive or not; for it vests in different parts and proportions, as they come in *esse*. *Goodwyn v. Goodwyn*, H. 1748, 1 Vesey, 226.]

[By a marriage settlement lands were limited to A. for life, remainder to B. for life, with intermediate remainders, remainder to the heirs of the body of B. A. becomes a bankrupt; and by an act of parliament passed to vest his estate in trustees for the payment of his debts, &c. the lands in question were given after payment, &c. to B. for life, with *such remainders over*, (in general terms of reference,) *as were limited by the settlement*: under these circumstances B. had a vested estate-tail, of which she might suffer a recovery. *Goodright v. Rigby*, C. P. Trin. 32 Geo. 3. 2 H. Bl. 46. B. R. East. 33 Geo. 3. 5 T. R. 177.]

[If an estate be devised to B., the wife of A., for life, remainder to trustees to preserve, &c. remainder to the children of A. and B., and *their heirs for ever*, to be divided among them equally; and if but one child, to such only child, and his or her heirs for ever; and for *default of such issue*, remainder over: and at the death of the deviser, A. and B. have no child, the estate limited to their children is a contingent remainder in fee, which on the birth of a child will vest in that child, subject to open and let in those who may be born afterwards, and the remainders over will be defeated by that estate becoming vested. *Doe v. Perryn*, B. R. M. 30 Geo. 3. 3 T. R. 484.]

[In such a case the words "for default of *such issue*," mean "for *default of such children*." *Ibid.*]

[A. devised to his son B. for life, remainder to trustees during B.'s life to preserve, &c. nevertheless to permit B. to receive the rents and profits, remainder to the first and other sons of B. in tail male, remainder in C.; with a proviso, that if B. should succeed to the estate of D., the limitation of A.'s estate to B. should cease, and the next in remainder should take, as if B. were dead; B. succeeded to D.'s estate before he had a son: held that the limitation to the trustees continued during the whole of B.'s life, so as to support the contingent remainders. *Doe v. Heneage*, B. R. M. 31 Geo. 3. 4 T. R. 13.]

[By a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c. as the husband and wife should appoint; and for want of such appointment, to the use of all and every the child or children, equally, if more than one, as tenants in common, and if but one, then to such only child, his or her heirs or assigns for ever; remainder over. In the deed was contained a power enabling the settlors to revoke the uses of the settlement, and the

the trustees to sell the estate, and convey it to a purchaser, so as the purchase-money should be paid to the trustees, (and not the settlors,) and invested in the purchase of other lands to the same uses: it was held that the remainder to the children was a vested remainder in fee to each child when born, liable, however, to be divested by an appointment by the parents; and consequently, (no appointment having been made,) that the remainder to the children could not be defeated by a deed of revocation by the parents; and a conveyance by them and the trustees to a purchaser, who paid the consideration-money to the settlors, (not to the trustees,) which was never laid out in the purchase of any other land. *Doe v. Martin*, B. R. M. 31 Geo. 3. 4 T. R. 39.]

[That power of revocation was conditional; and, as the conditions, namely, the payment of the money to the trustees, and the settling of other estates to the same uses, were not performed, the deed of revocation was a nullity. *Ibid.*]

(B 18.) *When an estate shall be executed, and not remain.*] If an estate be granted to husband and wife for their joint lives, remainder to the heirs of the body of the wife by the husband begotten; it shall be an estate-tail executed in the wife, tho' the jointure is not severed. *R. Ray.* 126.

So, if there be a contingent *mesne* remainder between an estate for life, or years, and the limitation of the inheritance, it shall be executed till the contingency happens; as, if a feoffment be to the use of *B.* for life, remainder to the first son which *B.* shall have, in tail, remainder to *B.* and his heirs; the estate is executed in *B.* till the son be born. *Vide 2 Sand.* 383.

So, to *B.* for life, remainder to the first son which *B.* shall have, in tail, remainder to the heirs of the body of *B.* begotten, &c.; an estate-tail is executed in *B.* *Cont. per two J. Cro. El.* 316. *But acc. clearly, 2 Sand.* 383. 386.

So, if it be to *B.* for life, remainder to his first son who shall have issue male, and his heirs for ever, and for want of such issue remainder to *B.* and his heirs. *R. Cro. Cur.* 364.

So, a devise to *A.* for life, and after his death to the heirs of his body, is an estate-tail executed. *R. Cart.* 171. *Vide Devise*, (N 5.)

So, a covenant to stand seised to himself for life, remainder to *A.* for life, remainder to the 1st, 2d, 3d, and every other son of his body, and the heirs male of the bodies of such 1st, 2d, and other son issuing severally and successively; provided that if *A.* dies without issue male, the covenantor shall stand seised to the intent to raise 100*l.* for a daughter, shall be an estate-tail executed in *A.* *R. 2 Jon.* 114.

So, a feoffment to the use of husband and wife for life, remainder to their first son in tail, remainder to the husband and wife and the heirs of their bodies, is an estate-tail executed in them. *Co. L.* 28. a. *R. 11 Co.* 80.

But if an estate be to *A.* for life, remainder to the next heir male of *A.* and the heirs male of his body; it is not an estate-tail executed in *A.*, because the remainder is to his next heir male in the singular number, with words of limitation to his heirs. *R. 1 Co.* 66. b. *Archer.*

Or, to *A.* for life, remainder *seniori puero* of his body, in tail. *R. Mq.* 104. Tho'



Tho' the remainder to the next heir be upon a contingency, and in abeyance. *Semb. Pol. 83, &c.*

So, if there be a *mesne* remainder *in esse*, the estate shall not be executed: as, if it be to *A.* for years, remainder to *B.* for life, remainder to the right heirs of *A.*, it shall not be an estate executed in *A.* *R. 3 Lev. 407.*

Or, to *A.* for life, remainder to his wife, remainder to the right heirs which *A.* shall beget upon the body of his wife; it is not executed in *A.*, because of the remainder to the wife. *R. Ray. 36. 1 Sid. 83. R. 2 Lev. 407.*

Or, to *A.* for life, and afterwards to the wife for life, remainder to the heirs of both their bodies. *Ray. 36. R. 1 Lev. 37.*

So, a possibility may prevent the execution of an estate: as, if a devise be to *A.* his son and heir, and if he dies without issue, living *B.*, to *B.* and his heirs; if he has issue living at his death, to the issue and his heirs; this *mesne* possibility prevents the merger of the estate for life in *A.* by the descent of the fee. *3 Lev. 407.*

So, if an estate comes by several conveyances, it shall not be executed; as, if by indenture an estate is settled to *A.* for life, and afterwards by devise it is given to the issues of the body of *A.* *Per Holt, Skin. 559.*

(B 19.) *A remainder; by what words created.*] If any words are used by which an estate is raised depending upon a particular estate, it is sufficient: as, if a man makes a lease to *A.* for life, and that after the death of *A.* the lands *redibunt* to *B.* and *C.* and their heirs; it will be a good remainder to them. *Pl. Com. 29. a.*

If a lease be to *A.* for life, remainder to *W.*, and if *W.* dies, living *A.*, that then it shall remain to *B.*; it will be a good remainder to *B.*: for it does not import that *B.* shall have it in the life of *A.* if *W.* dies, but that he shall have it in remainder, as *W.* had it. *Pl. Com. 29. b. 32. a.*

If a devise be to *A.* for life, and if he has issue male, to his issue male and his heirs; a remainder vests in the first son, for the issue male shall be taken as a single person. *R. 1 Sal. 224.*

(B 20.) *When it shall take effect.*] If a demise be to *A.* for 10 years, and of other land to *B.* for 20 years, remainder, after the determination of those several leases, to *C.* when the 10 years expire; the remainder begins in the land demised to *A.*, for it shall be construed distributively. *R. 5 Co. 7.*

So, a devise of land to *A.* for life, of a house to his wife for a year after his death, and that after a year and the death of *A.* all his lands and tenements shall go to *B.*; he shall have the house at the end of the year, tho' *A.* be then living. *R. 1 Lev. 212.*

If a limitation be to the use of *A.* for life, and of other land to the use of *B.* for life, and after the death of *A.* and *B.* that the whole shall go to *D.*; he shall have, after the death of each, the land limited to him. *R. Pol. 65. 67.*

If a devise be to his two sons and the heirs of their bodies, and that his executor shall have it till his sons attain their several ages of 21 years; if the eldest attains 21 years, he shall have his part, tho' they are joint-tenants. *R. 2 Cro. 259.*

But

But where there are cross-remainders, or by exprefs words he in remainder shall not take part till he takes the whole, there the remainder shall not take effect by parcels: as, if a devise be to *A.* and *B.* and their heirs, equally to be divided, and if they die without issue, I give all the lands to *D.*; if *A.* dies without issue, a moiety does not go to *D.*: for the intent is expreffed, that he shall take the whole only when both are dead without issue. *R. Ray.* 452. *Pol.* 425. 434. *Vide Devise*, (N 14, 15.)

(B 21.) A Gift in Tail, with a Fee expectant.

If a feoffment be to the use of *A.* and a woman whom he intends to marry, and their heirs, *habendum* to them and the heirs of their bodies, they have an estate-tail, with a fee expectant. *R.* 2 *Rol.* 19. 23. *Cont.* 8 *Co.* 154. *b.* *Co. L.* 21. *a.* *Vide Fait*, (E 9.)

Or, if a feoffment be to *A.* and the heirs of his body, *habendum* to him and his heirs. *Co. L.* 21. *a.*

(B 22.) Alienation by Tenant in Tail.

(B 22.) *What does not bar the issue.*] By the *st. W.* 2. 1. *de Donis*, it was enacted, *quod non habeant illi quibus tenementum fuit sic datum*, (*viz.* the tenant in tail,) *potestatem alienandi*, &c.

And therefore, by common law since this statute, tenant in tail could not by fine, feoffment, grant, release, or confirmation, &c. bar the estate-tail. 2 *Inst.* 335.

Nor, tenant in tail by descent, tho' the statute says, *illi quibus tenementum fuit datum*. 2 *Inst.* 336.

So, he cannot charge the estate-tail. 1 *Rol.* 841. *l.* 52.

So, if he accepts a fine *sur conusance de droit come ceo*, &c. from another; that does not change his estate. *R.* 1 *Vent.* 257.

So, a fine by him, without proclamations, does not bar the entail, tho' it makes a discontinuance. *Semb.* *Jon.* 254. *Vide Fine*, (G 1.)

(B 23.) *What shall be void.*] If tenant in tail makes a grant of a thing not *in esse*, as of a rent *de novo* out of land, the grant after his death is void as to the issue. *Co. L.* 327. *b.* 3 *Co.* 85. *b.* *Pl. Com.* 437. 1 *Lev.* 168.

So, if he grants the next avoidance. *R.* 1 *Rol.* 853. *l.* 5. 1 *Bul.* 32. 35.

Or, be bound in a statute-staple, &c. *Pl. Com.* 437. *a.*

So, if tenant in tail in remainder after an estate for life, grants his estate to another, it determines by his death.

So, if tenant in tail makes a lease to commence after his death by exprefs words, it will be void. 1 *Sid.* 261.

(B 24.) *What only voidable.*] But if tenant in tail makes a discontinuance by feoffment, &c. this is only voidable by action of the issue or him in remainder or reversion. *Co. L.* 327. *b.* 3 *Co.* 85. *b.*

So, if by bargain and sale, covenant to stand seised, lease and release, &c. he conveys to a stranger, a base fee passes, which is not avoided till entry of the issue. *Vide post.* (B 33.)

So, if tenant in tail makes a lease rendring rent, not warranted by the *st.* 32 *H.* 8. it is only voidable.

Tho'

Tho' the lease be to commence at a future day, and he dies before the commencement. 1 *Roll.* 842. l. 50. 843. l. 15. *R. Pl. Com.* 437.

Or, without rendring rent. *R. 1 Sid.* 261.

So, if tenant in tail grants an advowson, common, tithes, rent in esse, or other thing which lies in grant to another in fee; the issue in tail may make the grant void, or only voidable, at his election: for he may by entry or claim make it void, or avoid it by *formedon*. *Co. L.* 327. b. *R. 3 Co.* 84, 5.

So, if tenant in tail grants a reversion or remainder. 3 *Co.* 85. a. 86. a.

Tho' the grant was by fine before the *fl.* 32 *H.* 8. *R. 2 And.* 110.

So, if tenant in tail makes a feoffment, tho' he cannot retain the estate or profits, yet the right to the entail remains in him, which may be barred by fine or recovery, or, if it be not barred or forfeited, shall descend to his issue. *R. Hob.* 336.

(B 25.) *What bars the issue. A fine with proclamations.*] So, by the *fl.* 4 *H.* 7. 24. a fine in *C. B.* of lands, tenements, and hereditaments, after engrossing shall be proclaimed the same term and three following terms at four several days in every term: and being so proclaimed, shall be a final bar, and conclude all privies and strangers, except, &c. *Vide 1 Leo.* 75. *Vide post.* (B 31.)

And by the *fl.* 32 *H.* 8. 36. fines with proclamations by persons of full age of lands, &c. before such fine levied entailed to the person levying the same, or any of his ancestors, in possession, reversion, remainder, or use, shall be a sufficient bar and discharge for ever against them, or any of their heirs claiming only by such entail, &c.

And therefore, if tenant in tail levies a fine of lands to him entailed with proclamations, the issue in tail shall be barred by it: for the *fl.* 32 *H.* 8. makes it a bar to the issue expressly. *R. Ray.* 359. 3 *Co.* 84.

Tho' the fine was levied of an estate-tail in reversion or remainder, and not in possession. 3 *Co.* 84. *Cro. El.* 610.

So, if tenant in tail be disseised, and afterwards levies a fine with proclamations, the issue shall be barred by it: for the statute does not speak of a seisin at the time of the fine, and the issue, being privy, is estopped to say, *quod partes finis nihil habuerunt*. *R. 3 Co.* 89, 90. *Cro. El.* 610.

Or, makes a discontinuance, and afterwards disseises the discontinuee, and levies a fine. *R. 3 Co.* 91. a. *Bend. pl.* 156. *Cro. El.* 610.

Tho' the discontinuee enters and avoids the fine, before all the proclamations pass. *R. 3 Co.* 91. a. *Cro. El.* 610.

So, if the king, tenant in tail, levies a fine, &c. the issue is barred. *R. 7 Co.* 32.

If the issue in tail levies a fine, &c. in the life of the tenant in tail, who afterwards dies, the issue and all his issues are barred; for the statute speaks of lands entailed to the person levying the same, or any of his ancestors. *R. 3 Co.* 51. a. 90. b.

So, if the issue in tail disseises his father, and afterwards levies the fine. *R. 3 Co.* 90.

So, if tenant in tail has issue two sons, the eldest levies a fine in the life of his father, who dies, and afterwards the eldest dies without issue; the fine shall be a bar to the younger brother: for he claims the



the entail thro' his eldest brother. *Per Periam, Mo. 252. Hob. 258. Co. L. 372. a. Jon. 32.*

So, if there be grandfather, father, and son, the grandfather tenant in tail, the father levies a fine in the life of the grandfather, and dies in the life of the grandfather, and then the estate descends to the son; he shall be barred by the fine of his father: for tho' he claims from the grandfather, yet he derives his title through the blood of his father. *3 Co. 90. b. Hob. 333.*

So, if *A.*, tenant in tail, remainder to the heirs male of his father, levies a fine, and dies without issue; the son of the father by another venter is barred. *R. 3 Leo. 10.*

So, if an estate-tail be devised to *B.* when he attains 24 years of age, and he before such age levies a fine, and after such age dies; the issue is barred: for the statute speaks of land *before the time of the fine entailed*, &c. which extends to an entail *in futuro*. *R. Cro. El. 122. 10 Co. 50. a. 2 Leo. 36. 3 Leo. 211. Cro. El. 610.*

So, if husband and wife be tenants in tail, and the husband alone levies a fine; it bars the issue in tail: for he claims as heir of the body of both. *R. Dy. 351. b. R. 9 Co. 140. Bend. pl. 257. Dal. 50. R. 1 And. 39. Sav. 9.*

And if the husband dies, and his wife afterwards enters and avoids the fine, (as she may within five years,) whereby she is seised of an estate-tail, and the remainders are re-vested; yet after her death the issue is barred. *Hob. 257. 259. Dal. 50.*

So, if the husband, after a fine by him alone, declares the uses to him and his wife, by which they are remitted, and the remainders re-vested; yet the issue is barred: for after the death of the wife the remitter ceases, and the estates are turned again to a right. *Hob. 260.*

So, if tenant in tail of a rent issuing out of the manor of *D.* levies a fine of the manor, with intent to bar the rent; the issue shall be barred, tho' the rent was not expressed in the fine: for it is comprised within a fine of the manor out of which it was issuing. *Per two J. Hut. cont. 2 Cro. 699. 2 Rol. 500.*

So, if tenant in tail of an office levies a fine of land belonging to the office. *2 Rol. 500.*

If tenant in tail levies a fine and dies before all the proclamations are past, yet the issue shall be barred if the proclamations afterwards pass. *R. 3 Co. 86. b. 90. a. Semb. 2 And. 112.*

And the issue, by entry, or action, or claim, before the proclamations are all past, cannot avoid the fine. *R. 3 Co. 87. a. 90. b.*

And every fine shall be intended to be with proclamations, till the contrary appears. *R. 3 Co. 86. b.*

And the statutes which make a fine with proclamations a bar, give all incidents to perfect the fine. If it be levied by him in reversion, &c. *a quid juris clamat*, &c. *R. 3 Co. 86. b.*

If tenant in tail levies a fine, the issue shall be barred, tho' within age, out of the realm, *covert*, *non compos*, or in prison. *R. 3 Co. 91. a.*

So, the king, tenant in tail, may bar by fine. *Cro. Car. 96, 7.*

So, a fine by tenant in tail not only bars, but extinguishes the estate-tail. *4 Mod. 5. 2 Leo. 37. 1 Sal. 338.*

For a fine by tenant in tail is as complete a bar to the issue, as a scoffment by tenant in fee. *1 Leo. 85.*

And

And therefore, it will be as effectual a bar when found by verdict, as if it had been pleaded. *R. 2 Leo. 37.*

But if tenant in tail makes a feoffment, and the feoffee levies a fine, the issue in tail is not barred if he claims within five years after the death of the tenant in tail. *3 Co. 87. b.*

So, if tenant in tail be disseised, and the disseisor levies a fine, and tenant in tail, or his issue, claims within five years after the fine. *3 Co. 87. b.*

So, if the fine by tenant in tail was not with proclamations, but a fine at common law, it is not a bar.

So, if tenant in tail levies a fine *sur grant & render*, the issue may avoid it, if the father dies before the fine is executed. *3 Co. 89. b.*

So, if tenant in tail, upon a fine, grants and renders a rent out of the land entailed, the issue is not bound by it: for the fine was not of the land itself, but of a rent newly created. *R. 3 Co. 90. a. Semb. Dy. 213. b. Bend. pl. 141. Pl. Com. 435. b.*

So, if tenant in tail has issue two sons, and the eldest levies a fine, and dies in the life of his father; the youngest shall not be barred; for he does not claim by his eldest brother, nor need mention him in his pedigree. *Per Periam, Mo. 252. R. 2 Cro. 689. R. Hob. 332. R. Cro. Car. 434. 2 Rol. 501. Jon. 32.*

So, if there be tenant in tail to him and his wife, and the heirs males of their bodies, remainder to them and the heirs of their bodies, the husband dies having issue a son and a daughter, the son levies a fine, and dies without issue in the life of his mother; the daughter shall not be barred. *R. Hob. 332.*

So, if there be three sons, and the middle one levies a fine, and survives his father, but dies without issue in the life of the eldest brother; his fine shall not be a bar to his eldest or youngest brother. *Hob. 333.*

So, if the issue in tail levies a fine, and afterwards the tenant in tail makes a lease not warranted by the *ft. 32 H. 8.* the lease is good against the donee, as long as the issue in tail does not fail. *R. 2 Cro. 689. 2 Rol. 498. Bridg. 27. Jon. 60. R. 1 Sid. 62. 1 Rol. 843. l. 20. Vide Fine (L).*

So, if tenant for life, and he in remainder in tail, join in a lease to *A.* for life, remainder to *B.* for life, and the issue in tail accepts the rent of *A.* and levies a fine. *R. Cro. El. 253.*

So, if tenant in tail makes a lease, and afterwards levies a fine; the donee shall not avoid the lease. *4 Mod. 6. Dub. 1 Lev. 168.*

Or, if he and the issue in tail join in a lease or charge, and afterwards join in a fine.

Or, if the tenant in tail makes a lease, &c. and the issue afterwards affirms it by acceptance of rent, and then levies a fine.

Or, if the issue in tail makes a lease, and afterwards dies, and his issue, having then the entail, levies a fine. *R. 4 Mod. 5. Dy. 51. b.*

Otherwise, if the lease was to commence *in futuro*, and the fine was levied by the issue before the commencement. *R. 1 Sal. 338. R. 1 Sid. 260. Skin. 284. 317.*

So, a fine by tenant in tail of the king's gift, the reversion or remainder to the king does not bar the issue, in all cases where by the *ft. 34 H. 8. 20.* a recovery by him should not be a bar. *Co. L. 372. b. R. 8 Co. 78. a. Vide post. (B. 31.)*

So,

So, a fine by tenant in tail is not a bar to him in reversion or remainder, if he claims, or pursues his action within five years after the tail ended. *Co. L. 372. a. Vide Fine, (K 1, 2.)*

(B 26.) *A real recovery, &c.*] So, a recovery in a real action, by verdict upon *ne dona pas*, binds the issue. *1 Rol. 840. l. 5.*

So, if tenant in tail forfeits double the value of the marriage to the lord, it binds the issue. *1 Rol. 842. l. 5.*

So, if tenant in tail grants a rent-charge for a release of a right to the land, it binds the issue. *1 Rol. 842. l. 10.*

Or, in pursuance of a condition annexed to an estate-tail. *1 Rol. 842. l. 20. 30.*

But if a recovery be by default without voucher, the issue may falsify. *1 Rol. 840. l. 10.*

Tho' the recovery be in a writ of right. *Co. L. 373. a.*

So, if the lord recovers in a *cessavit* against tenant in tail, it does not bind the issue. *Co. L. 373. a.*

(B 27.) *A common recovery. What interest shall be barred by it.*] So, if tenant in tail suffers a common recovery, it bars the issue in respect of the recompence in value. *R. 10 Co. 37. b. R. Poph. 100.*

How it shall be passed, *vide in Pleader, (3 A 2, &c.)*

Who shall be a good tenant to the *præcipe*, *vide in Recovery, (B 3, 4.) Vide Copyhold, (C 9.)*

Tho' he dies before execution. *1 Co. 106. 2 Rol. 396. l. 10. Dy. 374. a. 376. b. Vide Execution, (A 2, 3.)*

And this has always been allowed since the *st. de Donis. 10 Co. 37. b.*

Tho' he had before levied a fine, whereby his estate-tail is extinct. *R. 1 Rol. 223.*

Tho' the recompence in value can never be obtained. *R. 10 Co. 38. a.*

Tho' it be erroneous; so long as it stands in force. *R. Poph. 100.*

So, if tenant for life, remainder in tail, suffers a common recovery, and vouches him in remainder; it bars the estate-tail. *R. 10 Co. 44. 3 Co. 60. b. Cro. El. 562. 570. Mo. 690.*

And the remainder in fee. *R. Cro. El. 562. 570. 3 Co. 61. a.*

So, if husband and wife are tenants in special tail, remainder to the husband in tail general, remainder to B., and the husband alone suffers a recovery; tho' it is no bar to the wife and her issue, but for a moiety, yet the husband having a remainder in tail general, all subsequent remainders are barred. *R. 3 Lev. 108.*

So, a common recovery by tenant in tail bars all remainders, or the reversion depending upon it. *2 Rol. 396. l. 7. 6 Co. 42.*

And all charges granted by him in reversion, or remainder. *R. 1 Co. 63. a. Poph. 5.*

[If A. covenants on his marriage to lay out 3000*l.* in land, and to settle to himself in tail, remainder to B., and purchases land, but never settles it, but suffers a recovery of it, this discharges the lien, bars B. of the benefit of the covenant, and of the remainder. *Marwood v. Turner, H. 1732, 3 P. W. 163.*]

[If tenant in tail charges land with any incumbrance, and afterwards suffers common recovery; it lets in all incumbrances. *Beck v. Welsh, T. 24 G. 2. 1 Wils. 276.*]

So, if he in remainder makes a lease for life, upon condition; a recovery



recovery by tenant in tail bars the estate for life, and also the condition. *R. 2 Co. 52. b.*

So, a remainder to the right heirs of *B.* shall be barred; tho' it be in abeyance. *R. 6 Co. 42. a. Per Gawdy, 1 Co. 135. b. 136. a.*

So, a remainder for years: for the lessee cannot falsify. *Per Twissd. 1 Sid. 102. 2 Lev. 30.*

So, a devise to another, upon a contingency after the death of tenant in tail without issue. *R. Mo. 73.*

So, if an estate-tail be granted, and afterwards to the use that *B.* shall have a rent-charge, remainder over; a common recovery by the tenant in tail bars the rent-charge. *R. 2 Lev. 29, 30.*

And this, tho' the recompence in value does not extend to the rent: for the supposed recompence is the cause of the bar to the issue; but the ground of the bar of the reversion or remainder is, that it is a common assurance, and *quasi* excepted out of the *st. de Donis*. *Per Hale, 2 Lev. 30.*

So, if there be tenant in tail, rendring rent to him in the reversion, with condition of re-entry for non-payment; a common recovery by the tenant in tail bars the condition. *2 Lev. 30. Cont. Sal. 570, 1.*

So, by a common recovery, a power to make a jointure, leases, &c. shall be barred. *R. 2 Lev. 60. Vide Poir (D).*

So, a common recovery bars the right of having a writ of error to reverse a fine by tenant in tail. *R. Mo. 365.*

So, a common recovery bars a collateral condition annexed to an estate-tail: as, if a gift in tail be, upon condition to pay a sum in gross, and for non-payment to re-enter. *Sal. 571.*

Or, upon condition, that if the donee marries any other than *Searle*, the estate goes over. *R. Sal. 570.*

So, if tenant in tail leases for years, acknowledges a judgment, &c. and afterwards suffers a common recovery to make a jointure, &c. the recovery enures for confirmation of the lease, &c. *R. Ca. Ch. 120. 2 And. 111. Vide ante, (B 25.)*

[If lands are limited to *A.* for 99 years, if he so long live, and from his death, or other sooner determination, to trustees and their heirs during *A.*'s life, to preserve contingent uses and estates, and after the end or sooner determination, to the use of the first and other sons of *A.* in tail male, with other remainders over; and *A.* has a son *B.* who attains 21, and *A.* and *B.* levy fine to make tenant to *præcipe*, and suffer recovery, in which *B.* is vouched; the remainders over are not barred. *Smyth v. Packhurst, opinion of the twelve Judges in the House of Lords, 1742, 3 Atkyns, 134.*]

[If a man devise to his daughter an express estate-tail; but afterwards say such estate shall be void as to inheritance of heirs, if she die without children, and the estate shall descend to his heir male: a recovery suffered by the daughter is good, though she afterwards die without issue. *Corop. 379.*]

(B 28.) *If it be with single voucher.*] If the *præcipe* be against the tenant in tail himself, the estate shall be barred of which he was actually seised, and all remainders dependent upon it.

If tenant in tail, in remainder after an estate for life, disseises the tenant for life, and suffers a recovery with single voucher, the entail is barred: for the *disseisin* extends only to the estate for life, and does not turn the estate-tail to a right. *Cont. semb. 3 Co. 59. a. Acc. 2 Ro. 395. l. 10. But*

But no estate shall be barred, which was turned to a right, and of which the tenant to the *præcipe* had not actual seisin, or seisin in law. 2 *Rel.* 394. l. 50.

And therefore, if tenant in tail makes a feoffment to the use of himself in fee, or in tail, and afterwards suffers a recovery, the first estate-tail is not barred: for he was seised only of the estate raised by the feoffment. *Pl. Com.* 8. a. *Manxel.*

So, if he covenants to stand seised to the use of himself for life, and afterwards to his son in tail, and afterwards suffers a recovery with single voucher. *R. Yel.* 51.

So, if tenant in tail discontinues, and takes back an estate-tail, and a recovery is had against him. 3 *Co.* 5. b.

So, if tenant in tail be disseised, and the disseisor enfeoffs him, and afterwards he suffers a recovery with single voucher. *R.* 3 *Co.* 59. a. 2 *Rel.* 395. l. 5.

So, if there be tenant for life, remainder to *A.* in tail, and a recovery is pleaded to be had against *A.* *tunc tenentem liberi tenementi*, (which ought to be intended to be by *disseisin*,) when the tenant for life appears by the same record to be living, with single voucher, the entail is not barred by it. 3 *Co.* 59. a.

So, if husband and wife are seised in tail, and a recovery is had against the husband alone. 3 *Co.* 5. b.

So, if *A.*, tenant for life, remainder to *B.* in tail, joins in a fine *surgrant & render* to *A.* for life, and afterwards to *B.* in fee, and then *B.* suffers a recovery with single voucher to the use of himself in fee; the entail is not barred: for tho' the fine did not make a discontinuance, being by *B.* not seised in tail, yet the estate-tail was devested by it, so that he was not seised in tail at the time of the recovery. *R. Cro. El.* 826.

If *A.*, tenant in tail, leases to *B.* for life, (which is a discontinuance,) and dies, and *B.* surrenders upon condition to *C.* who has the remainder in tail, against whom a *præcipe* is brought, and a recovery had; the estate-tail of *C.* is not barred; for *C.* was not remitted. *R. Skin.* 3. 63.

(B 29.) *If it be by tenant in tail as vouchee.*] If tenant in tail be vouchee in a common recovery, he comes in privy of such estate as he ever had. *Pl. Com.* 8. a. *Manxel.*

And therefore, if husband and wife, seised to them and the heirs of the body of the husband, make a discontinuance, and the discontinuance suffers a recovery, and vouches the husband; the tail shall be barred. *R.* 3 *Co.* 6. *R.* 6 *Co.* 32. a.

If tenant in special tail discontinues, and takes back an estate in tail general, and afterwards takes back an estate to him and his heirs upon *B.* begotten, and afterwards discontinues, and the discontinuance suffers a recovery, and vouches the tenant in tail; the three several entails are barred by one recompence: for the vouchee comes in in privy of all the estates. *Pl. Com.* 8. b. 3 *Co.* 6.

So, if the tenant vouches a stranger at first, who afterwards vouches the tenant in tail; his estate shall be barred. *R. Sal.* 571.

So, if the heir be vouched, he comes in in privy of the estate of his ancestor to whom he was heir: as, if tenant in fee makes a feoffment, and the feoffee suffers a recovery, and vouches the heir of the feoffor. *Semb. Pl. Com.* 7. b. So,

So, if tenant in tail in possession and he in remainder be jointly vouched, tho' it be not so regular, yet the vouchee shall be barred: for the joining of a stranger with him does not prejudice. *R. Sal. 571.*

But the vouchee comes in in the same degree as he had the estate at first: and therefore, if a recovery would not bar his estate when he was seised, it shall not be barred if he be a vouchee. *Pl. Com. 7. b.*

So, if a parson enfeoffs with warranty, and be vouched, he shall pray in aid of the patron and ordinary. *Pl. Com. 7. a.*

If tenant by the curtesy enfeoffs with warranty, and is vouched; he shall have aid: for he comes in in the same plight as when he was seised of the land. *Pl. Com. 7. b.*

(B 30.) *What interest is not barred.*] But a common recovery does not bar an interest precedent to the estate-tail of which the recovery was suffered: as, if tenant in tail, remainder to *A.*, remainder to *B.*, remainder to *C.*, makes a feoffment, and the feoffee suffers a recovery, and vouches *B.*, his estate-tail and all the subsequent remainders are barred; but not the estate of *A.* or other precedent estates. *R. 3 Co. 6.*

[So, if *A.* be tenant for years, remainder to *B.* for life, remainder to the first and other sons of *B.* in tail, remainder to *B.* in tail, and if *A.* and *B.* join in making a tenant to the *præcipe* by lease and release, and suffer a recovery to this only, bars the remainder to *B.*, but not the intermediate remainder to his first and other sons. *1 Term Rep. 738.*]

So, if tenant in tail makes a lease, and afterwards suffers a recovery; the precedent lease is not barred. *R. Cro. El. 718. Eq. Abr. 257. Vide ante, (B 25.)*

So, if an estate be granted to *B.* in tail, rendring rent to him in reversion, and *B.* suffers a recovery; the rent shall not be barred. *R. Cro. El. 792. Per Hale, 2 Lev. 30. Sal. 571.*

So, if tenant in tail makes a mortgage, and afterwards suffers a recovery for a collateral purpose; the mortgage shall be confirmed by the recovery. *Eq. Abr. 257.*

So, generally, a common recovery does not bar a thing to which the recompence in value does not extend: as, if a man be not in privy of the estate-tail: as, if tenant in tail be attainted of treason, and the king grants his estate to *A.*, who enfeoffs *B.* who suffers a recovery, in which *A.* is vouched; the estate-tail is not barred; for *A.* claims *paramount* the entail. *2 Rol. 394. l. 40.*

So, if tenant in tail be attainted of treason, and afterwards suffers a recovery; this does not bar the remainder. *2 Rol. 394. l. 37.*

If tenant in tail enfeoffs *B.* who suffers a common recovery without vouching the tenant in tail. *Ray. 29.*

So, a mere possibility shall not be barred by a recovery: as, if a devise be to *A.* and his heirs, and if he dies without issue in the life of *B.*, to *B.*; a recovery by *A.*, without joining *B.*, does not bar his possibility. *R. 2 Cro. 593. 2 Rol. 394. l. 20.*

But if *B.* comes in as vouchee, his possibility shall be barred. *2 Cro. 593.*

So, in all cases of an executory devise, a recovery does not bar him who claims by such devise. *R. 1 Lev. 136.*

So, a recovery by a mortgagee does not bar the mortgagor, if he be not vouched. *R. 2 Cro. 593.*

So,



So, if an estate be granted to *A.* and his heirs so long as *B.* has heirs of his body; a recovery by *A.* does not bar the donor: for a recovery by tenant in fee does not bar a collateral interest; as, a condition, covenant, &c. *Per Houghton, 2 Cro. 593.*

(B 31.) *If the reversion, or remainder, be in the king.*] So, by the *st. 34 & 35 H. 8. 20.* a common recovery by tenant in tail of lands, &c. whereof the reversion, or remainder at the time of such recovery shall be in the king, shall not bind the heirs in tail. *R. Dy. 32. a. in marg.*

[But in order to be protected by this statute, the estate-tail, with reversion to the king in fee, must be clearly of the gift or provision of the king. *1 Bl. Rep. 654.*]

So, if there be tenant in tail, remainder in tail, the reversion or remainder to the king; a common recovery by the tenant in tail does not bar the first remainder, any more than the heir in tail. *Co. L. 372. b.*

So, if the king, after a gift in tail, grants the reversion to another in tail, the fee to the king; a recovery by tenant in tail does not bar the reversion in tail. *R. 8 Co. 77, 8.*

So, if the king procures a subject, for money, &c. to make to *B.* an estate-tail, for recompence of service, &c. remainder to the king, and this appears upon record; *B.* by recovery cannot bar the entail. *Co. El. 372. b. 2 Co. 16. a.*

And this statute extends to subsequent as well as precedent gifts in tail by the king. *Co. L. 373. a.*

So, a fine does not bar the estate-tail, where it was given by the king, and the reversion continues in the crown. *1 Sid. 166. Acc. Cro. El. 595.*

[If tenant in tail-male, reversion in the crown, suffers common recovery with single voucher, before *34 H. 8.* recoveror gains a *base fee*, determinable on failure of issue male, and descendible and alienable till then, the reversion still in the crown. *Neal v. Wilding, P. 23 G. 2. 1 Wilf. 275.*]

But this *st. 34 H. 8. 20.* does not extend to an estate-tail made by a subject, tho' he afterwards grants the reversion or remainder to the king. *Co. L. 372. b. 2 Rol. 393. l. 50. 396. l. 15. R. Mo. 195. 2 Co. 15. b. 1 And. 142. 146. Lut. 848.*

Or, it descends afterwards to the king. *Co. L. 372. b. R. 2 Co. 15. b.*

Or, if the reversion or remainder be to the king only for life or years. *Co. L. 372. b.*

Or, if the reversion or remainder be granted over by the king, before the recovery suffered. *Co. L. 372. b. Ray. 288.*

So, if the estate-tail be created by the king for a valuable consideration. *Per three J. Dy. 32. a. in marg.*

[*A.* seised in fee enfeoffs *C.* (afterwards king) and his heirs for ever, who when king, by letters patent reciting, &c. and that he is willing to do what law, equity, faith, and conscience require, grants the premises to *B.*, granddaughter and heir of *A.*, to hold to *B.* and her heirs of the duchy of *Lancaster*, and if *B.* dies without heirs, then to revert to the king and his heirs: this is not within the protection of *st. 34 & 35 H. 8. c. 20.* the grant not being a gift or reward, but

made as an act of justice. *Perkins v. Sewell*, P. 8 G. 3. 4 B. M. 2223.]

So, if an estate-tail be varied by a new act of parliament. *Dub. Ray.* 260. 286. 319.

If the reversion be granted by the king to *A.*, to the intent that there shall be a recovery, and that it shall be afterwards re-granted to the king. *R. Hard.* 409.

Yet where a reversion or remainder is in the king, a recovery by tenant in tail cannot bar or divest such reversion, &c. And therefore, if a recovery be by tenant in tail, (which was not by gift of the king,) the reversion or remainder to the king; the estate-tail and all remainders are barred, except the estate of the king. 2 *Roll.* 394. l. 2. *R. Bend. pl.* 254. *Dy.* 32. a. 1 *And.* 142.

So, if a recovery be by tenant in tail, remainder to the king in tail, remainder to *B.* in fee; the estate-tail and remainder in fee are barred. 2 *Roll.* 394. l. 5. *Lut.* 848.

And where a recovery is a bar, a fine with proclamations shall be a bar to the entail, tho' the reversion be in the king. *Co. L.* 373. a.

So, a fine *sur grant & render.* *Sav.* 106.

So, a fine by a disseisee of an estate-tail of the gift of the king, and non-claim for five years, shall be a bar to the tail. *Co. L.* 373. a. *Dub. Cro. El.* 595. said that it is not law. 1 *Sid.* 166. *Vide Fine*, (K 1, 2.)

So, a collateral warranty of the ancestor of the tenant in tail. *Co. L.* 373. a.

But a fine by tenant in tail, where the reversion is in the king, does not divest the reversion, but passes the estate to the donee, during the continuance of the entail. *R.* 3 *Leo.* 57. 4 *Leo.* 40. *Per three J. before the st.* 34 H. 8. *Dy.* 32. a.

If a reversion upon an estate-tail be granted to the king, and before the deed is inrolled, a recovery is suffered; the reversion is barred. *Dub. Mo.* 752.

(B 32.) *A demise pursuant to the st.* 32 H. 8.] So, by *st.* 32 H. 8. 28. all leases by writing indented under seal, for years, or life, by any of full age, having an estate in fee-tail, shall be good against the lessor and his heirs, in like sort as if he had been seised in fee-simple. *Vide Baron and Feme*, (G 3.) *Vide post.* (G 4, 5.)

Provided, not to extend to leases of lands then in lease, if the same be not surrendered or ended within a year after the new lease, nor of lands not most commonly letten for 20 years next before, nor to leases without impeachment of waste, or above 21 years, or three lives from the day of making, or whereon is not reserved during the term the most accustomed rent paid for the same tenements for 20 years next before.

And that the issue in tail may have the reversion, rents, and services, and all remedies and advantages after the death of the lessor, in the same manner as the lessor himself if living might have had.

But a demise by any, not having the estate-tail, does not bind his issue: as, if land be given to *A.* and his wife, and the heirs of the body of the survivor, and they make a lease for 21 years, or three lives, pursuant to the directions of the statute; that does not bind the issue: for the estate-tail does not vest, till the time of the survivorship, in the survivor. *R.* 10 *Co.* 51. a. So,

So, a demise by tenant in tail does not bind his issue, if it be not by indenture. *Vide post.* (G 5.)

If it does not commence from the making, or the day of the making. *Vide post.* (G 5. 8.)

If it be above three lives, or 21 years. *Vide post.* (G 5.)

Or, dispunishable for waste. *Vide post.* (G 5.)

Or, of lands not most commonly letten, or occupied by the farmers thereof, by the space of 20 years next before. *Vide post.* (G 5.)

Or, if there be not reserved during the term the most accustomable rent paid within 20 years before. *Vide post.* (G 5.)

Yet if more be reserved than the accustomable rent, it is good. *Co. L. 44. b.*

So, if the antient yearly rent be reserved, it is sufficient; tho' a heriot, fine upon the death of the tenant, or other casual profit, not annual, be not reserved. *Co. L. 44. b. Vide post.* (G 5.)

So, if tenant in tail demises part of land most accustomably letten, and reserves a rent *pro rata*, it is sufficient. *Co. L. 44. b.*

Or, if parceners in tail make partition, and each demises her part, reserving a rent *pro rata*. *Co. L. 44. b.*

So, if tenant in tail to him and the heirs male of the body of his grandfather, demises, rendring rent to him and his heirs, and dies without issue male, having a daughter who is his heir; the lease shall be good: for the rent follows the reversion. *R. Hard. 90. 95.*

So, a demise by tenant in tail does not bind him in reversion, or remainder. *Noy, 6. R. Cro. El. 602. R. 8 Co. 34. a. Cont. Dy. 48. b. But acc. in marg.*

So, a lease by a woman tenant in tail, who takes husband, and the husband, being tenant by the curtesy, surrenders to the issue, does not bind the issue. *Mo. 8.*

(B 33.) *How an alienation by tenant in tail operates as to himself.* If tenant in tail levies a fine, or suffers a recovery, the whole right of the entail is barred and extinguished. *Hob. 337.*

If he levies a fine to him in reversion; the entail is extinct, and the conusee is in in his reversion. *Jon. 33.*

If he makes a feoffment, the whole estate is gone as to himself; but the right of the entail remains in him, which shall afterwards descend to his issue in tail. *Hob. 336.*

But if tenant in tail, in remainder after an estate for life, levies a fine *sur concessit* to the tenant for life, it does not make an alteration of the entail after the life determined. *R. 2 Cro. 40.*

Tho' it be to husband and wife for the life of the wife who was tenant for life; and it is no discontinuance or bar to the entail but for her life only. *R. 2 Cro. 40.*

If tenant in tail grants *totum statum suum* to another; the grantee has an estate only for the life of tenant in tail; but the estate-tail shall be in abeyance. *Lit. f. 650.*

So, if he releases to a disseisor all his right, the right to the inheritance in tail is in abeyance. *Lit. f. 649.*

So, if tenant in tail be attainted for felony, and the king, upon office enters; the estate-tail shall be in abeyance. *Co. L. 345. a.*

And after a grant of *totum statum suum*, the tenant in tail cannot maintain waste: for no reversion remains in him. *Lit. f. 650.*



So, if he grants *totum statum suum*, remainder to another; the remainder is void: for nothing remains in him after his whole estate is granted. *R. 2 Co. 52. a.*

If tenant for life, the reversion or remainder to the king, grants *totum statum* to *A.* who dies in the life of the grantor; the king shall have it immediately. *Sav. 62.*

But a grant of his whole estate by the king, tenant in tail is void: for the king is deceived in his grant. *1 Co. 46. a. 52. a.*

If there be tenant in tail, remainder to *B.* in tail, and *B.* by deed inrolled conveys to the king and his heirs; nothing passes but for the life of *B.* *Dub. Godb. 442.*

If tenant in tail covenants to stand seised to the use of himself for life, remainder to his son in tail; this does not make an alteration in his estate, but he remains tenant in tail as before, and his wife shall be endowed, &c. *R. Mo. 32. R. Fel. 51. R. 2 Co. 52. a. R. Cro. El. (471.)* And tho' these books speak of an alteration for his own life, yet in reality there is not any alteration. *R. Tr. 1 An. B. R. inter Machel and Clerk. (Sal. 619. Com. 119.) R. Cro. El. 895. Noy, 46. 1 Brownl. 193. R. 1 And. 291. R. Cro. El. 279.*

So, if he makes a bargain and sale to *B.* who re-bargains to him, he shall be tenant in tail as before. *Fel. 51.*

So, if he grants an advowson to *B.* to the use of himself and his wife, and to the heirs male of the husband; it shall be void as to the wife after the death of the husband. *R. 1 Brownl. 161.*

Yet it seems that to some respects there is an alteration as to himself: for a recovery afterwards by him with single voucher, does not bar remainders depending on the first entail: for he was not seised of the first estate-tail. *R. Fel. 51.*

But if tenant in tail bargains and sells to *B.* and his heirs; a base fee passes, which shall not be avoided till entry of the issue. *Per Holt, Tr. 1 An. inter Machel and Clerk. (Vide Sal. 619. Com. 119.) R. 10 Co. 96. a.*

So, if he conveys by lease and release to *B.* and his heirs. *R. inter Machel and Clerk. (Sal. 619. Com. 119.)* It is called a freehold descendible. *1 Sand. 261.*

[Tenant in tail by lease and release, previous to her marriage, conveyed to trustees to the use of herself till the marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, &c.; tenant in tail died before the husband, leaving a son; and it was holden that the husband was not entitled to a life-estate either under the settlement, or as tenant by the curtesy. *Neville v. Rivers, B. R. E. 37 Geo. 3. 7 T. R. 276.*]

[A conveyance by lease and release by tenant in tail conveys a base fee voidable by the entry of the issue in tail. *Ibid.*]

Or, covenants to stand seised to *B.* and his heirs. *Per Holt, inter Machel and Clerk.*

So, if he covenants to stand seised to the use of himself for life, remainder to *B.* and his heirs. *R. Tr. 1 An. inter Machel and Clerk. (Sal. 619. Com. 119.)*

Or, bargains and sells to the use of himself for life, remainder to *B.* and his heirs. *R. inter Machel and Clerk. (Sal. 619. Com. 119.)*

Or, if he covenants to stand seised to *A.* for life, remainder to *B.* and his heirs; tho' *A.* dies in the lifetime of the tenant in tail. *Per Holt, inter Machel and Clerk. (Sal. 619. Com. 119.)* Or,

Or, to himself for years if he shall so long live, remainder to his son for life, &c. *Dub. 2 Lev. 84.*

If the bargainee or tenant in tail, &c. enters; his estate descends to his heir till it be avoided. *D. 10 Co. 98. a.*

And his wife shall be endowed. *24 Ed. 3. 28. b. 10 Co. 98. a. Cont. per Vau. Cart. 210. D. cont. Cro. El. 805.*

Nor, shall he be subject to waste or forfeiture. *10 Co. 98. Cart. 210.*

And his devise is good till avoided. *Dy. 253. Cont. Cro. El. 805. Cart. 210. R. that the devise is void. 1 Sand. 261.*

[Tenant in tail of lands mortgaged is not obliged to keep down the interest, but tenant for life is. *Chaplin v. Chaplin, H. 1733, 3 P. W. 229.*]

### (C) An Estate Tail after Possibility of Issue extinct.

(C 1.) What shall be.

**T**ENANT in tail, after possibility of issue extinct, is when by the death of one of the tenants in special tail, there is no possibility of issue inheritable to the same entail, the survivor is tenant in tail after possibility, &c.: as, if a gift in tail be to husband and wife and the heirs of their bodies begotten, and one of them dies without issue. *Lit. f. 32.*

Or, if they have issue, and after the death of one, the issue dies without issue. *Lit. f. 32.*

So, if a gift be to a husband and the heirs of his body begotten upon A. his wife, and A. dies without issue. *Lit. f. 33.*

Or, to a husband with a daughter or cousin in *frank-marriage*, and the wife dies without issue; the husband is tenant in tail after possibility, &c. *Co. L. 28. b.*

But if there be any possibility of issue inheritable to the entail, the survivor shall not be tenant in tail after possibility, &c.: as, if husband and wife to them and the heirs of their bodies be each 100 years of age, they are not tenants after possibility, &c.; for the law does not intend an impossibility of issue. *Co. L. 28. a.*

So, donee in tail general can never be tenant in tail after possibility: for there never can be in him an impossibility of issue inheritable to his estate. *Lit. f. 34.*

Nor, the issue of a donee in special tail. *Ibid.*

And therefore, if a gift be to a husband and the heirs of his body, remainder to him and his wife and the heirs of their bodies, tho' the husband dies without issue, the wife shall not be tenant after possibility, &c.; for the remainder after the tail general never took effect. *Co. L. 28. b.*

So, no one can become tenant after possibility but by the act of God: and therefore, if husband and wife by feoffment take an estate which is limited to the use of them for their lives, and afterwards to their first issue male in tail, and afterwards to the heirs of their bodies; tho' they have an estate in special tail executed, yet, if issue be born, they become tenants for life only, and not tenants in tail after possibility, &c. *Co. L. 28. a.*

So, if tenants in special tail are divorced *à vinculo*, they have but an estate for life: but neither shall have the privilege of tenant after possibility,

possibility, &c. because the divorce was not by the act of God, but *ex provisione hominis*. Co. L. 28. a.

(C 2.) In what Respects Tenant in Tail after Possibility, &c. is regarded only as Tenant for Life.

Tenant in tail after possibility, &c. may make an exchange with tenant for life: for their estates are equal in quantity, tho' not in quality. Co. L. 28. a. *Vide ante*, (C 1.)

So, if tenant in tail after possibility, &c. makes a feoffment, it will be a forfeiture. Co. L. 28. a. *Vide Forfeiture*, (A 1.)

Or, if he otherwise aliens in fee. Co. L. 28. b.

So, his estate shall be merged by a descent or conveyance of the reversion, or remainder to him in fee, or in tail: for the fee, or the estate-tail, shall be executed. Co. L. 28. a.

So, upon his default, there shall be receipt of him in reversion, or remainder. Co. L. 28. a.

So, if he cuts down trees, the lessor shall take them, tho' waste does not lie against him. 4 Co. 53. a.

(C 3.) What Privileges he claims above a Tenant for Life.

But in respect of his estate, which was originally an estate-tail, tenant after possibility, &c. shall not be punished for waste. Co. L. 27. b.

Nor, compellable to attorn to a grant of the reversion. *Ibid.*

Nor, shall he have aid of him in the reversion. *Ibid.*

So, a writ of *consimili casu* does not lie upon his alienation; nor a writ of intrusion after his death. *Ibid.*

So, in a writ of right he may join the *mise* in a special manor. *Ibid.*

And in a *præcipe* by or against him, he shall not be named as tenant for life. *Ibid.*

But an assignee of an estate after possibility, &c. shall not have any privilege above a tenant for life: for the privity, by the assignment, is gone; and with it the privileges. Co. L. 28. a. 11 Co. 83. b.

## (D) Tenant by the Curtesy of *England*.

(D 1.) Who shall be.

**I**F a man takes a wife seised in fee, or in tail, by whom he has issue, he shall hold, by the curtesy of *England*, the lands after the death of his wife, for his life. *Lit. f.* 35.

So, if the wife be seised of any estate which such issue might inherit.

Tho' the wife afterwards dies without issue, by which her estate is determined. R. 8 Co. 54. *Paine*.

So, if the wife ever was seised, tho' she be afterwards disseised. Co. L. 30. a.

So, if the wife had only a seisin in law, where a seisin in fact was not possible: as, if an advowson descends to a woman who takes husband, has issue, and dies before avoidance. Co. L. 29. a.

Or, a rent descends, and she dies before rent incurs. *Ibid.*

A man shall be tenant by the curtesy of lands, or tenements.

Of rents, advowsons, commons, &c.

Tho' the rent, common, &c. be suspended, when the suspension is only for years. Co. L. 29. b.



Of an office, or dignity. *Co. L. 29. a. b.*

Of a castle, or *caput baronia vel comitatus*. *Co. L. 30. b.*

Of common *sans nombre*. *Co. L. 30. b.*

So, a man shall be tenant by the curtesy tho' the estate-tail, &c. of which the wife was seised be determined. *Co. L. 30. a.*

[Husband may be tenant by the curtesy of a trust, tho' a wife cannot have dower thereof. *Chaplin v. Chaplin*, *H. 1733*, 3 *P. W.* 229.]

[If a woman seised in fee mortgages, marries, has issue, and dies without redeeming, the husband is tenant by the curtesy of the mortgaged premises, for the land in equity is considered only as a pledge for the money, and does not alter the mortgagor's possession. *Casborne v. Scarfe*, *H. 1737*, 1 *Atkyns*, 603.]

[If by articles previous to marriage, a woman grants to her intended husband during her life, the interest of her money, and the rents of her estates, to maintain the house, &c. this does not abridge his legal rights, but he shall have the curtesy in her real estate at the marriage, and in what came to her afterwards. *Steadman v. Palling*, *H. 1746*, 3 *Atkyns*, 423.]

[If lands on which leases for years are existing, and a rent incurred, descend to a wife as tenant in tail, and she survives three months after rent-day incurred, but makes no entry, nor is any rent paid during her life, yet this is such a possession of the wife as will make the husband tenant by the curtesy. *De Gray v. Richardson*, *P. 1747*, 3 *Atkyns*, 469.]

[A husband shall be tenant by the curtesy of money to be considered as land. *Cunningham v. Moody*, *M. 1748*, 1 *Vesey*, 174.]

And if a husband has issue by his wife, it is sufficient to make him tenant by the curtesy, tho' the issue dies immediately: for if it be born alive it is sufficient. *Co. L. 29. b.*

Tho' it was never heard to cry: for crying is but evidence of the life. *Co. L. 29. b.*

Tho' the issue be born and dies before the estate descends to the wife. *Co. L. 29. b.* 8 *Co. 35. b.* *Bro. Tenant per Curtesy*, 12.

So, by the custom of *gavelkind*, a man shall be tenant by the curtesy without having issue. *Co. L. 30. a.*

[Husband leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy. *Sidney v. Sidney*, *P. 1734*, 3 *P. W.* 269.]

And by having issue, the husband, in the life of his wife, shall do homage alone. *Co. L. 30. a.*

And an avowry shall be made upon the husband alone. *Co. L. 30. a.*

If the husband after issue makes a feoffment, the feoffee shall hold during the life of the husband: for his feoffment was not a forfeiture. *Co. L. 30. a.*

But by the feoffment his title to be tenant by the curtesy was extinguished: and therefore, if the feoffment was upon condition, and he enters for the condition broken; he shall not afterwards be tenant by the curtesy. *Co. L. 30. b.*

So, if he levies a fine, which is reversed after the death of his wife; his title to be tenant by the curtesy shall be extinct. *Semb. 5 Mod. 67.*

Otherwise, if the fine be reverfed by error in the life of his wife : for he has afterwards a new title. 5 *Mod.* 67.

(D 2.) Who not.

But a man shall not be tenant by the curtesy, where the wife is not seised of such estate as that the issue which her husband has by her may, by possibility, inherit the same estate.

As, if a woman has an estate to her and the heirs male of her body, and she has issue a daughter ; her husband shall not be tenant by the curtesy. *Co. L.* 29. *b.*

If a woman, tenant in tail, makes a discontinuance, and takes back an estate in fee, and then takes husband, has issue, and dies : the issue, by a *formedon*, may recover the estate-tail in the life of its father : for she was not seised of the tail during the coverture. *Co. L.* 29. *b.*

If an estate be given to two women, and the heirs of their bodies, and one of them takes husband, and has issue. *Cont. Co. L.* 30. *a.* *Acc.* 2 *Rel.* 90. *l.* 50. *Semb. acc. Co. L.* 183. *Eq. Ca.* 150. [2d Part of 2 *Mod. Ca.*]

So, he shall not be tenant by the curtesy of a seisin in law, where by possibility she might have obtained an actual seisin : as, if lands descend to a woman who takes husband, has issue, and dies before entry. *Co. L.* 29. *a.*

So, he shall not be tenant by the curtesy of a bare right or title. *Ibid.*

Nor, of a reversion, or remainder, expectant upon an estate of freehold. *Ibid.*

Nor, of a seignior, rent, or common, &c. suspended for life. *Co. L.* 29. *b.*

So, if the estate of the wife determines with her life by express limitation or condition, tho' the wife had a fee by a subsequent remainder, or by descent, the husband shall not be tenant by the curtesy : as, if an estate be limited to the wife for life, afterwards to the first, second, and other sons in tail, remainder to the right heirs of the body of the wife, remainder to her in fee : her husband shall not have it by the curtesy. *Eq. Ca.* 150. [2d Part of 2 *Mod. Ca.*]

[If a man by will directs trustees to convey a fourth part of his freehold lands to the use of his daughter *P.* for her natural life, so as she alone shall take the rents, and her husband not to intermeddle therewith, and after her death for the heirs of her body in fee ; her husband is not tenant by the curtesy, it being only an executory trust, and she taking only an estate for life. *Roberts v. Dixwell, M.* 1738, 1 *Atkyns*, 607.]

[If land is devised to *A.* and her heirs, and if she die before her husband, he to have 20*l.* *per annum* for life, the remainder to go to her children, the husband is not tenant by the curtesy. *Sumner v. Partridge, T.* 1740, 2 *Atkyns*, 47.]

[If a man gives his real estate to trustees, to permit his daughter to take the profits, and to dispose, &c. for her separate use, notwithstanding her coverture, her husband is not tenant by the curtesy. *Hearle v. Greenbank, P.* 1749, 3 *Atkyns*, 695. 1 *Vesey*, 298.]

Or, if a devise be to a woman for life, with a contingent remainder to her issue, by which the fee descends in the mean time to the woman being

being heir to the testator; her husband shall not be tenant by the curtesy. *R. Eq. Ca. 150. [2d Part of 2 Mod. Ca.]*

So, he shall not be tenant by the curtesy, if he has not issue born alive.

If the issue be ript out of the belly of its mother, tho' it be alive. *Co. L. 29. b.*

If the issue be a monster which has not human form. *Ibid.*

So, if after issue he be attainted for felony, and pardoned; he shall not be tenant by the curtesy, if he has not issue after the pardon. *Per Keble, 13 H. 7. 17. a.*

### Tenant in Dower.

Who shall be, and who not, *vide in Dower, (A 1, 2, &c.)*

### (E) Tenant for Life.

(E 1.) Who shall be.

**T**ENANT for term of life shall be, when lands are demised to a man for his life. *Lit. S. 56. Vide Copyhold, (C 10.)—Devise, (N 7.)*

Or, for the life of another. *Ibid.*

Or, for the life of himself and several others. *Co. L. 41. b. Mo. 8.*

So, if tenant for life, by curtesy, or in dower, grants his or her estate over, the grantee shall be tenant *pur autre vie*. *Co. L. 41. b.*

So, if lands are demised or granted to a man, generally, and livery made upon it. *Co. L. 42. a.*

And such demise or grant to another, generally, by tenant in fee, shall be an estate to the lessee for his own life. *Ibid.*

By tenant in tail, it shall be for the life of the lessor: for that is all which he can lawfully grant. *Ibid.*

So, a demise to another for a time indeterminate, passes for life, if livery be made; or of things which lie in grant, without livery: as, a lease to a man *quamdiu se bene gesserit*. *Ibid.*

To a woman *durante viduitate*; or, *dum sola*. *Ibid.*

To husband and wife, during coverture. *Ibid.*

To A. as long as he inhabits. *Ibid.*

Or, pays such rent. *Ibid.*

Or, till he be preferred to such a benefice. *Ibid.*

Or, till out of the profits he has paid 100*l.* or other sum. *Ibid.*

Or, during his exile, if he be absent from his country; tho' not by edict, but voluntarily. *R. 1 Vent. 326.*

So, if the king grants office at will, and a rent for it for his life; he has an estate for life in the rent, tho it determines with the office. *Co. L. 42. a.*

(E 2.) What Interest he has.

Tenant for life has a freehold, as well as tenant in fee, or tail. *Co. L. 43. b.*

So, his life is greater than another's life: and therefore, if he leases to him in remainder or reversion for his life; he shall have it after the death of the lessee: for it was not a surrender. *Co. L. 42. a.*

So, if tenant for life takes husband, and they lease to him in reversion or remainder for the life of the husband. *Ibid.* And



And upon such lease a rent may be reserved. *Co. L. 42. a.*

So, if tenant for life and he in reversion join in a lease for life, they may join in waste, and he for life shall have *locum vastatum*, and he in reversion, damages. *Ibid.*

So, joint-tenants, the one for life, the other in fee. *Ibid.*

So, if *A.* recovers dower against tenant for life, he shall have the land after the death of *A.* *Ibid.*

### (E 3.) What Privileges he shall have.

Tenant for life, or for years, shall have house-bote, plough-bote, hay-bote; viz. *estoveria edificandi ardendi, et claudendi.* *Co. L. 41. b.*

And these reasonable *estovers* he shall have upon the land demised, without assignment; if he be not restrained. *Ibid.*

So, if the lessor covenants that he shall take *estovers* in a wood not demised; he shall take in both. *R. Dal. 4 Mo. 7.*

If he demises a manor, (except *Frith-close*;) and covenants that he shall take them *super premissa*; he shall not take them in *Frith-close*. *R. 1 Leo. 117.*

Otherwise, if the demise was (except the trees) and a covenant so; he shall take the trees excepted for *estovers*. *R. 1 Leo. 117.*

Or, if it be averred, that there are no *estovers* but in the land excepted. *R. Cro. El. 125.*

If a grant be to a lessee to take *estovers* from time to time in a close not demised, without saying for what time; he shall take them during the term. *R. Mo. 7.*

But the lessee cannot take fire-bote except of underwood. *3 Leo. 16.*

Or, if fire-bote be expressly granted, and there be not sufficient underwood; he may take it of the great trees. *Ibid.*

*Estovers* may be claimed in *alieno solo* by grant, or by prescription.

If a grant be to a lessee to take *estovers*, he shall have them during his term, and his executor after him. *R. Dal. 4.*

If there be no timber for repairs, it shall be found by the lessor, if there be no default in the lessee. *Per two J. Dal. 4.*

But a grant of *estovers* to *A.* gives him a right only for his life.

Tho' the grant be to *A. pro castamento ipsius & heredum*, and pursuant to a covenant to convey to him and his heirs. *R. 1 Leo. 2.*

### (F) Occupant.

#### (F 1.) Who shall be.

**I**F tenant *pur auter vie* of lands or tenements dies before the *cestuy que vie*, he who first enters and takes possession of the land, shall have it during the life of the *cestuy que vie*, as occupant. *Co. L. 41. b.*

And therefore, if any enters to the use of another; he who enters shall be occupant. *R. 2 Rol. 151. l. 35.*

If tenant *pur auter vie* leases for years, and dies before the *cestuy que vie*; the lessee shall be occupant, and his lease shall be extinct. *Qu. Dy. 328. b. R. 2. Rol. 151. l. 22. 2 Bul. 11.*

If such lessee leases to *B.* at will, *B.* being in possession shall be occupant. *R. 2 Cro. 554. R. 2 Rol. 151. l. 30. 2 Bul. 11.*

Tho' *B.* claims nothing but as tenant at will. *R. 2 Bul. 11. 2 Rol. 151. l. 30. 2 Cro. 554.*

If tenant *pur auter vie* leases to a *feme-covert* at will, her husband shall be occupant. *Per Twifden, 1 Sid. 347.*

If lessee at will cuts down trees, which is a determination of the will, yet he shall be occupant. *Per Twifden, 1 Sid. 347.*

So, if tenant *pur auter vie* was disseised, and dies, the disseisor shall be occupant. *Per Croke, 2 Bul. 12 D. Cont. 2 Leo. 121.*

If tenant for life levies a fine to the use of himself and *A.*, and if *A.* dies in the life of tenant for life, to *B.*; *A.* dies in the lifetime of tenant for life; by equity it goes to *B.* *2 Cro. 201.*

But he who claims to be occupant, if he does not take actual possession, shall not be occupant. *Vau. 188. 1 Sid. 347. 3 Leo. 36.*

So, if a man goes cross the land, without other intent, he shall not be occupant. *D. Cart. 61.*

If at the death of tenant *pur auter vie*, his wife and son be upon the tenements, they shall not be occupants without more, for the uncertainty. *D. Cart. 61.*

So, if a man makes a lease in trust for himself for life, and afterwards for his wife, and enters, and dies; the lessee shall not be occupant. *Vide 1 Sid. 347.*

So, if tenant *pur auter vie* makes a lease upon the same trust; the lessee shall not be occupant, but the wife, if she enters. *R. per three J. Bridgman cont. and affirmed in error, Cart. 57. 1 Sid. 347. 1 Lev. 202.*

So, if a lease be to *A.* and his heirs *pur auter vie*, and *A.* dies; his heir shall be special occupant. *Co. L. 41. b. 2 Rol. 150. l. 15. 151. l. 40. 50. D. 10 Co. 98. a.*

So, if tenant *pur auter vie* grants a lease to commence after his death; the lessee may enter and have it during his term, tho' a stranger first entred. *Per two J. Cro. El. 182. Agreed 1 Lev. 202.*

[An estate *pur auter vie* may be limited to *A.* in tail, remainder to *B.*; for this is only a description who shall take as special occupants during the life of *cestuy que vie*. *Low v. Burron, P. 1734, 3 P. W. 262.*]

[But this does not make an estate-tail in *A.*, for all estates-tail are of inheritance, to which dower is incident, and within the statute *de Donis*; and this is neither, but a descendible freehold only. *Ibid.*]

[If an estate *pur auter vie* is limited to *A.* and the heirs of his body, remainder to *B.* *A.* by lease, or lease and release, may bar the heirs of his body, but not *B.* *Ibid.*]

[Nor, by any act. *Semb. per Talbot C. Ibid.*]

[*A.* being seised in fee of several freehold estates, and also possessed of a leasehold rectory for lives, devised "all his manors, messuages, lands, tenements, tythes, and hereditaments, and all his real estate whatsoever, (except what is thereafter mentioned and devised,) to trustees," in strict settlement; he charged his leasehold with rent-charges to two of his younger children, and directed that when any of the lives dropped, the lease should be renewed, and the names of those two children put in, of whom a son was to have the preference: it was holden, that the rectory did not pass by the general words of the devise, but that *A.*'s eldest son and heir took, as special occupant, on the death of *A.* *Sheffield v. Mulgrave, B. R. E. 34 Geo. 3. 5 T. R. 571.*]

[If a freehold lease for lives be limited to *A.* and the heirs of his body

body, with remainder over, *A.* may may dispose of the whole, and defeat the remainders by any conveyance during his lifetime; or *semb.* by his will alone. *Blake v. Luxton, B. R. E. 35 Geo. 3. 6 T. R. 289. 3 P. Wms. 10. n.*

[If an estate *pur auter vie* be limited to a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to the heir as special occupant. *Atkinson v. Baker, B. R. E. 31 Geo. 3. 4 T. R. 229.*]

[Where it is granted to a person, his executors, administrators and assigns, the executors take it subject to the same debts as personalty of any other description is. *Per Ld. Kenyon, Ibid.*]

[But if an estate *pur auter vie* is devised to *A.* for life, remainder to her husband for life, remainder to their first and other sons in tail male, remainder to their daughters in tail, remainder to the right heirs of *A.*, and the lease is renewed according to these limitations; Chancery, on a bill by the eldest son, having a son minor, will decree the lease to be renewed to the use of *A.* for life, remainder to the plaintiff and his heirs (a fine *sur concefferunt* being first levied). *D. Grafton v. Hanmer, 1722, 3 P. W. 266.*]

[If *A.* seised of a lease to him and his heirs for three lives, by settlement before marriage limits it to himself for life, and to his first and every other son in tail male, a person may take such estate so granted in fee, determinable on three lives by way of remainder, as a special occupant. *Norton v. Frecker H. 1737, 1 Atkyns, 524.*]

But if a lease be to *A.*, his executors or assigns, *pur auter vie*; his executor shall not have it as special occupant: for an occupant has the freehold, which an executor cannot take. *Dy. 328. b. R. 2 Rol. 152. l. 5. Yel. 9.*

Nor, his administrator: for he is not an assignee to such intent. *R. Cro. El. 901. Mo. 664. R. Yel. 9.*

Nor, shall he be subject to payment of debts. *1 Ver. 234.*

Yet, by the *st. 29 Car. 2. 3.* if tenant *pur auter vie* does not devise his estate, and there be not a special occupant, it shall go to the executors or administrators of the grantee, and be assets in their hands.

And this ought to be understood, *for want of assets*: for the executor shall not have it if he does not prove such want. *R. 1 Ver. 234.*; for in its nature it is an inheritable estate, and goes to the heir. *Semb. 2 Ver. 320.*

[By *st. 14 G. 2. c. 20. st. 9.* surplus of estates *pur auter vie*, if no special occupant, and not devised, shall go and be distributed as the personal estate of testator or intestate.]

And he who enters shall be occupant; but *quoad* creditors he is executor *de son tort.* *Carth. 166.*

#### (F 2.) Of what Things.

Occupancy ought to be of things of which there may be an actual possession: as, of land, or sea. *Vau. 188.*

But there cannot be an occupant of a rent. *Co. L. 41. b. Cro. El. 721. 901. R. Mo. 664. 2 Rol. 150. l. 48.*

Nor, of a thing existing solely by creation of law: as, of an advowson, common, fair, title, dignity, &c. *Vau. 190. 194.*

Nor, of tythes, &c. *Vau. 201.*

Nor, of an use before the *st. 27 H. 8. 10. 2 Cro. 261.*

And



And things, of which there cannot be an occupant, determine by the death of tenant for life. *Vau.* 201.

And if there be a remainder limited upon his estate, it commences immediately. *Per Popb. Mo.* 664.

So, there cannot be an occupant against the king. *Co. L.* 41. b. *Sav.* 62.

Yet, an occupant may take a common, advowson, &c. as appendant to land which he occupies. *Vau.* 190. 196.

So, if a lease be of land and tythes rendring rent, the occupant of the land shall have the tythes: for the rent is increased in respect of it, tho' it wholly issues out of the land. *Per Vaughan; but judgment was against him, Vau.* 202.

An occupant in the nature of the thing has but a bare possession, which he may take, or leave, at his pleasure. *Vau.* 189.

And therefore, he cannot be subject to a tenure, condition, &c. *Vau.* 189.

But civil constitutions may subject him: and therefore, by the common law, the freehold is cast upon the occupant. *Vau.* 191. 195.

So, an occupant shall be subject to a rent reserved upon the lease *pur auter vic.* *Vau.* 190. *Co. L.* 41. b.

So, if tenant *pur auter vie* leases for years to one, who leases at will: tho' the lessee at will be occupant, yet the lease for years is not extinct. *R. 2 Bul.* 12. *2 Rol.* 151. l. 30. *2 Cro.* 554.

Or, if a remainder was upon a lease for years, or the lease was of coven, &c. it shall not be extinct.

So, an occupant shall be subject to waste. *Co. L.* 41. b. *Vau.* 190.

So, to a forfeiture, condition, &c. *Vau.* 190.

### (G) Tenant for Years.

(G 1.) By what Words a Lease shall be.

**T**ENANT for term of years shall be, where a man lets lands to another for a term of certain years. *Lit. f.* 58.

The usual words to make a lease are, *demise, grant, to farm let, &c.* *Co. L.* 45. b.

So, any words, which amount to a grant, are sufficient for a lease. *Co. L.* 45. b.

As, if a man covenants, grants, and agrees, that B. shall have such land for so many years, and B. covenants to pay the rent; it is a good lease for years. *R. Mo.* 861. *Hob.* 35. *Win. Ent.* 119. *R. 2 Cro.* 92. *R. 1 Rol.* 847. l. 40. *R. Cro. Car.* 207. *Jon.* 231.

So, if he covenants, that the covenantee shall enjoy such land for such a time, rendring rent. *R. 1 Leo.* 136.

So, articles, which say, it is agreed that A. shall lease to B. for seven years, provided that B. shall render rent amounting to the present lease; tho' it be covenanted to make a lease according to the agreement. *R. 1 Rol.* 847. l. 50. *Cro. El.* 486.

So, if a man says, you shall have a lease of land in D. for 21 years at 10l. per annum, make a lease in writing, and I will seal it; it will be a lease by parol, tho' not in writing. *Cro. El.* 33. *Mo.* 8.

[Parol lease to commence at a future day is good, so it is not to hold for more than three years from the making. *Ryley v. Hicks, M.* 11 G. Str. 651.]

[A demise

[A demise from *Michaelmas* for a year, and so from year to year, is a lease for every particular year, and good for every year lessee enters into. *Combes v. Cole*, T. 9 G. 2. B. R. H. 305.]

[If tenant for years agrees with lessor that he shall have the premises for the remainder of the term, paying the rent reserved on the original lease; it is a lease, and not an assignment, tho' he has parted with the whole term. *Poultney v. Holmes*, M. 7 G. Str. 405.]

But a covenant, that a stranger shall enjoy such land for so many years at such a rent, does not amount to a lease, but a covenant. 1 Leo. 136.

So, a covenant, that he shall permit the covenantee himself to hold the land for so many years, does not amount to a lease: for it sounds only in covenant. R. 1 Rol. 848. l. 5.

So, an article, that he is content A. shall have a lease for six years, that the rent shall be 10 l., &c.; for it appears to be only instructions for a lease. R. 1 Rol. 848. l. 10.

So, a defeazance of a recognizance, that A. shall convey an advowson to B., and that B. shall always quietly enjoy it, does not amount to a present lease. R. Co. Ent. 85. a.

So, a covenant to levy a fine, upon condition, that if A. shall pay 100 l. within 13 years to B., it shall be to the use of A., and in the mean time to the use of B., and that B. shall enjoy it for 13 years, does not amount to a lease to B. if the fine be not levied. R. 2 Cro. 172. 1 Rol. 847. U.

[So, a paper containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed *in futuro*, operates only as an agreement for a lease, and not as a lease itself. *Goodtitle v. Way*, B. R. E. 27 Geo. 3. 1 T. R. 735.]

[So, an instrument on an agreement stamp, reciting that A., in case he should be entitled to certain premises on the death of B., would immediately devise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Coove v. Clare*, B. R. M. 29 Geo. 3. 2 T. R. 739.]

[Words in an agreement "that A. shall hold and enjoy," &c. if not accompanied by restraining words, shall operate as words of present demise. *Jackson v. Ashburner*, B. R. H. 33 Geo. 3. 5 T. R. 163.]

[Secus, if they be followed by others which shew that the parties intended that there shall be a lease *in futuro*. *Ibid.*]

[The whole must depend on the intention of the parties. *Ibid.*]

#### (G 2.) By what Persons.

Tenant in fee-simple may make leases, without limitation or restraint.

So, tenant in tail may make a lease for his own life.

And now, by the st. 32 H. 8. 28. he may make leases for three lives, or 21 years. *Vide ante*, (B 32.)—*Post*. (G 4, 5.)

So, by the same st. husband and wife may make leases for three lives, or 21 years, &c. *Vide Baron and Feme*, (G 3.)

[Master of the Rolls may make leases in trust for himself. *Wilson v. Sewell*, M. 7 G. 3. 4 B. M. 1975.]

[If tenant for life makes lease for years, and lessees, thinking he had power, lay out great sums, and reversioner lets them go on with-

out giving them notice, a court of equity will decree the remainder of the term, after the death of tenant for life, to the lessees. *Anon. in Sc. M. 1719, Bunb. 53.*]

(G 3.) *By spiritual persons, &c. at common law.*] So, by the common law, spiritual or ecclesiastical corporations might make leases for lives, or years, without limitation, or restraint, *concurrentibus iis quæ in jure requiruntur. Co. L. 44. a. 2 Inst. 457.*

So, a master and fellows of a college, hospital, &c. *Co. L. 44. a.*

An archbishop, or bishop, might make a lease, with the confirmation of the dean and chapter. *Co. L. 44. a. 10 Co. 60. a. 2 Lev. 137.*

So, a dean and chapter, by common consent under their common seal.

So, a prebendary with the assent of bishop, dean and chapter. *2 And. 168.*

And the bishop, and dean and chapter may confirm, by several deeds. *R. 1 And. 47.*

So, a parson or vicar of a church, with the consent of patron and ordinary. *Co. L. 44. a. 2 Lev. 61.*

Tho' the lease was to commence after his death, it would be good against the successor. *Dy. 69. a. Hob. 7.*

So, a lease by a parson or vicar before the *ſt. 13 El. 10.* was good, being confirmed; tho' the confirmation was after the statute. *R. Cro. El. 18. Vide poſt. (G 5.)*

But, a lease by an ecclesiastical person, before he was entitled to possession, was void: as, if the king appropriated a church, in the life of the incumbent, to a bishop, &c. and the bishop made a lease for 40 years to commence after the death of the incumbent; it would be void: for he had nothing in the lifetime of the incumbent. *R. Dy. 244.*

So, a lease by a parson, provost, &c. not confirmed, was void by his death. *Dy. 239. b. 2 H. 4. 5. a.*

Or, confirmed by patron and ordinary, but not by the grantee of the next avoidance. *Jon. 454.*

And tho' the grantee presents, and his presentee does not avoid the lease; the patron in fee may afterwards avoid it, tho' he confirmed it: for being once void, it shall not afterwards be good. *R. Jon. 454.*

(G 4.) *By the ſt. 32 H. 8. 28. 1 El. 19. & 13 El. 10.*] So, by the *ſt. 32 H. 8. 28.* all leases of any hereditaments by indenture under seal, for term of years, or life, by any person having an estate of inheritance in right of their churches, shall be good against them and their successors, in the same manner as if seised in fee.

Provided, not to extend to leases of lands in farm by virtue of any old lease, unless such old lease be expired, surrendered, or ended within one year after making of a new lease; nor to a grant of any reversion of lands, &c.; nor to a lease of lands not most commonly letten by the space of 20 years before; nor to a lease without impeachment of waste; nor to a lease above 21 years or three lives from the day of the making; and that on such lease be reserved the most accustomed rent paid for the same within 20 years next before.

Provided,



Provided, not to give power to any parson, or vicar, to lease lands, &c. of their churches, otherwise than before.

By the *ſt.* 1 *El.* 19. all estates made by any archbishop, or bishop, (to any but the queen, and by the *ſt.* 1 *Jac.* 3. estates to the crown,) and by the *ſt.* 13 *El.* 10. estates, leases, &c. by the master and fellows of any college, dean and chapter, master or guardian of an hospital, parson, vicar, or any having any spiritual or ecclesiastical living, of any lands belonging to their college, church, &c. shall be void, other than leases for 21 years or three lives from the time such leases shall be made, whereon the accustomed yearly rent shall be reserved payable during the said term.

Provided, not to make good any lease, or grant, by any college or collegiate church, for more years than warranted by their private statutes.

Provided, not to extend to any lease or surrender of a former lease, or by force of a covenant in a former lease then continuing; so that the new lease do not contain more years nor less rent than the former.

And by the *ſt.* 14 *El.* 11. the *ſt.* 13 *El.* 10. does not extend to leases of houses in any city, borough, town-corporate or market-town, or the suburbs thereof, made as by the law before, and the private statutes of any college, &c. they might have been made; so as such houses be not the capital or dwelling-house, and have not above 10 acres of land; and so as the lease be not made in reversion, and reserve the accustomed yearly rent, and charge the lessee with reparation, and be not made longer than for 40 years.

Nor, to alienations, when before, with, or presently after, assurance be made to such colleges and their successors, &c. in fee absolutely of lands, &c. of as good value, and as great yearly rent.

So, by the *ſt.* 18 *El.* 11. the leases upon the *ſt.* 13 *El.* 10. shall be void, if leases of lands, &c. whereof any former lease is in being, not to be surrendered or ended in three years next after making such new lease.

So, by the *ſt.* 18 *El.* 11. bonds, covenants, &c. to make or renew leases contrary to this act, and the *ſt.* 13 *El.* 10. are void.

By the *ſt.* 13 *El.* 20. no lease of any benefice, or ecclesiastical promotion with cure, shall be good, longer than the lessor is resident, serving the cure, without absence above 80 days in one year.

Provided, that a parson, having two benefices, may devise that on which he is not resident to his curate, who shall serve the cure; but such lease shall endure no longer than the curate's residence, without absence above 40 days in any one year.

And by the *ſt.* 14 *El.* 11. leases by curates shall be of no better force than if made by him for whom he serves the cure.

And therefore, now, all persons seised in right of their church are enabled to make leases for three lives, or 21 years, observing the directions of the *ſt.* 32 *H.* 8. and the restrictions of 1 & 13 *El.* *Co. L.* 44. *a.*

So, a bishop seised in right of his bishopric. *Co. L.* 44. *b.*

A dean, archdeacon, or prebendary, &c. seised of sole possessions in right of his deanery, &c.; for they are seised *jure ecclesie.* *Co. L.* 44. *b.* *R. Cro. El.* 350. 4 *Leo.* 51.

So, a chancellor of a church, treasurer, præcentor. *R.* 1 *Lev.* 112.

But

But a parson, or vicar, are not enabled by the *st.* 32 *H.* 8. yet they are restrained by the *st.* 13 *El.* 10. to make leases above three lives, or above 21 years. *Co. L.* 44. *b.*

(*G* 5.) *What leases are warranted by those statutes, and what not.*] By the *st.* 32 *H.* 8. 28. persons seised of an estate of inheritance in right of their churches, may lease all manors, lands, tenements, or other hereditaments, whereof they are so seised. *Vide Baron and Feme* (*G* 3.—*K*). *Vide ante*, (*B* 32.)

And this extends to all persons seised in fee in right of their church: as, to a chancellor of a cathedral church. *R.* 1 *Lev.* 112.

To a prebendary, treasurer, &c. 1 *Lev.* 112. *R. Cro. El.* 350. 4 *Leo.* 51.

A dean, archdeacon, and all others seised in right of the church, except a parson, and vicar.

But a lease, grant, estate, &c. is void by the *st.* 1 *El.* 19. and 13 *El.* 10. made of any manors, lands, &c. or other hereditaments, being parcel of the possessions of such bishopric, college, &c. (or belonging to the same, by the *st.* 1 *El.*)

And these words shall be understood of possessions, &c. concerning the bishopric. 10 *Co.* 61. *a.*

And therefore, if a bishop grants a rent-charge, it does not bind his successor. 5 *Co.* 15. *a.*

Or, grants an annuity; tho' it is personal: for it is a charge in respect of the bishopric, and his successor would be charged. 5 *Co.* 14. *b.* *R.* 10 *Co.* 61. *b.* *Bridg.* 31.

Or, suffers a recovery against him in a writ of annuity, by verdict or confession. 10 *Co.* 61. *a.*

Or, makes any charge or incumbrance. 10 *Co.* 60. *b.*

Or, makes a confirmation of a lease by his lessee. 5 *Co.* 15. *a.*

So, if he grants the next avoidance. *R.* 10 *Co.* 60. *b.* *Cro. Car.* 259. *R. Cro. El.* 440. 5 *Co.* 15. *a.* 1 *And.* 244.

Or, makes a disposition of any thing in his power, except by lease for lives, or years, not restrained. 10 *Co.* 60. *b.*

Or, permits an usurpation upon a church which belongs to him. *R. Jon.* 46.

So, if he grants new offices, which are not of necessity, &c. *R.* 1 *And.* 244.

Or, an antient office with a new fee. *R. per three J. Cro. Car.* 49.

Or, an antient fee, *una cum* 3 *l. per annum*: for the grant is in-  
tire; and therefore, being with a new fee, it is void. *Dub. Cro. Car.*  
48. *Semb.* that it is void only for the new fee. *Bridg.* 32. *Ley.* 71.  
*Vide infra.*

So, if he grants an antient office to two, where it was usually granted only to one. *R.* 10 *Co.* 61. *R. Cro. Car.* 259. *R. Jon.* 264.

Or, grants in reversion, an office granted only in possession. *R.* 10 *Co.* 61. *R. Cro. Car.* 259. *R. Jon.* 264.

[Bishops may grant antient offices, with the antient fees, in the same manner as they have been usually granted before 1 *El.* 19. and the utility of such office is immaterial. *Trelawney v. Bishop of Winchester*, *H.* 30 *G.* 2. 1 *B. M.* 219.]

So, if the grant be of things in grant, out of which a rent cannot  
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be reserved : as, of an advowson, fair, franchises, &c. *Co. L. 44. b. 10 Co. 60. b. R. 5 Co. 3. D. Bridg. 30.*

[By *ſt. 5 G. 3. c. 17.* leases by ecclesiastical persons, of tithes and other incorporeal hereditaments only, which lie in grant, and not in livery, for three lives or 21 years, are declared good.]

[But none shall grant longer lease than their local statutes allow.]

[Action of debt may be brought for rent 28 days in arrear, on such lease.]

Yet a grant of offices of necessity, confirmed by the dean and chapter, &c. is not restrained by the *ſt. 1 El.* or *13 El.* if it be with the antient fee : because there is no diminution of the revenue ; and it is therefore good against the successor. *R. 10 Co. 61.*

So, a grant of a new office of necessity, with a reasonable fee, being confirmed by the dean and chapter, is not restrained ; and the reasonableness of the fee shall be adjudged by the court : as, the office of keeper of his house and gardens, with a fee of 3*l.* *R. Cro. Car. 48. 10 Co. 61. b. Bridg. 31.*

The office of parker, and steward. *R. Cro. Car. 48. Bridg. 29. Ley, 71.*

The office of commissary, or official. *R. Jon. 264. Cro. Car. 258.*

So, a grant of the office of register by the bishop of *Bristol*, &c. newly founded, as well as by an antient bishopric, if it was usually granted before the *ſt. 13 El. 10. R. 2 Lev. 137.*

So, a grant of an antient office with an antient fee, if by another grant a new fee be also added, it is void only as to the new fee. *Vide supra.*

So, a grant in reversion is good, where antient grants have been in reversion. *Cro. Car. 259.*

Or, a grant to two, where antient grants were so ; tho' they were not of late time. *4 Mod. 17.*

And usage since the statute is evidence of antient usage at the time of the statute. *R. 4 Mod. 17.*

So, a confirmation of a lease after *13 El.* if the lease was made before the *ſt. 13 El. 10. 5 Co. 15. Vide ante, (G 3.)*

So, a lease by a bishop, as trustee for a charity, is good against his successor ; tho' it be not conformable to the statute. *Duke, 139.*

A lease within this statute ought to be by indenture ; and not by deed-poll, or *parol.* *Co. L. 44. a.*

So, it ought to commence from the making. *Co. El. 44. a. Mo. 253. [Cowp. 714.] Vide post. (G 8, 9.)*

Or, from the day of the making. *Vide the ſt. 13 El. 10. Co. L. 44. a. Cont. Co. L. 45. a.*

Or, *a dotu* ; for that shall be construed to be *from the delivery, ut res magis valeat.* *R. per three J. Treby cont. 3 Lev. 439. Semb. Mo. 107.*

And therefore, to commence at a future day, is void. *1 Leo. 36. 3 Leo. 131.*

So, it ought not to exceed three lives, or 21 years. *Co. L. 44. b.*

And therefore, if it be for four lives, it shall be void ; tho' one of them dies in the life of the lessor. *10 Co. 62.*

So, if it be for three lives and 21 years also, both together : for the statute speaks in the disjunctive. *Co. L. 44. b. R. 5 Co. 2. Mo. 253. R. Cro. El. 141. But*



But a lease for three lives, tho' the lessee is not one of them, shall be good. *R. 6 Co. 37. b. 2 Cro. 76.*

So, a lease for one, or two lives, or for less than 21 years. *Co. L. 44. b. R. 1 Leo. 306.*

Or, for 10 years, and afterwards for 11 years. *1 Leo. 148.*

Or, for 20 years from *Michaelmas* next. *1 Leo. 148.*

So, a lease for 20 years, and another for 20 years after the end of the former, is good within the *st. 14 El. Poph. 9. Cont. semb. 3 Keb. 196.*

So, it shall not be without impeachment of waste. *Co. L. 44. b.*

And therefore, a lease to one for life, remainder to another for life, is not good: because waste cannot be punished. *Co. L. 44. b. Mo. 387.*

So, a concurrent lease for life shall be void, tho' it be confirmed by the dean and chapter, &c.; for the former would be dispunishable for waste. *Co. L. 45. a.*

But a lease for three lives is good: for the occupant shall be punishable for waste. *Co. L. 44. b.*

So, it ought to be of lands most usually demised, or occupied by the farmers of it, for 20 years next before. *Co. L. 44. b.*

And the demise ought to be by him who has the inheritance: for a demise by tenant by the curtesy, or in dower, or guardian in *chivalry*, &c. is not sufficient. *Co. L. 44. b.*

But it is sufficient, if the land has been usually demised, or occupied by farmers within 20 years, in the disjunctive: and therefore, if land antiently demised, be purchased by a bishop, and manured 15 years in his hands, it may be afterwards demised. *R. per two J. 1 Sid. 316. 416. 1 Lev. 213. but two J. cont. there. Ray. 165.*

So, a demise by will, or a grant by copy, is sufficient, if it be for 11 years or more, at one or several times. *Co. L. 44. b. R. 6 Co. 37. 2 Cro. 76. R. Mo. 759.*

And the most accustomed rent, paid for 20 years next before, ought to be reserved annually during the term. *Co. L. 44. b.*

And therefore, a lease of a thing, out of which rent cannot be reserved, shall be void against the successor: as, a lease of a fair, franchise, or other thing not manurable. *R. 5 Co. 3. a. 2 Cro. 111.*

Or, of tithes, &c. *R. per three J. Mo. 778. R. 2 Cro. 173. 112.*

Tho' the antient rent be reserved: for it is not incident to the reversion, tho' it be good by way of a contract. *R. 5 Co. 3. a.*

Yet if the demise was for years, for which the successor may have remedy for the rent in respect of the contract, it may be good. *R. 2 Cro. 112. D. 2 Sand. 304. Per Hale, Hard. 326.*

So, a lease is not good, where part of the lands never were demised: for then the antient rent cannot be reserved. *Mo. 199.*

So, a lease is not good, which reserves the rent in *silver*, which was before in *gold*: for it is not the accustomed rent. *R. 5 Co. 5. b.*

Or, reserves the antient rent *pro rata*. *5 Co. 5. b.*

Or, joins two farms, and reserves the rent of both together. *Ibid.*

Or, if two farms were antiently demised, and the demise is of one, rendering the antient rent, without saying, what rent. *R. Cro. Car. 95.*

Or, if a copyhold be purchased in, and the antient rent is augmented *pro rata*. *R. 5 Co. 5. b. Mo. 199.*

Or, if two acres, with other lands, are demised, and the antient rent of the two acres be reserved for the whole. *R. 2 Jon. 111.*

Or, if two acres are demised, without an exception of trees, which usually were excepted, reserving the same rent. *R. 2 Cro. 458.*

So, by *st. 18 El. 6.* no master, provost, &c. of any college, &c. in any of the universities, *Winchester*, or *Eaton*, shall lease any the lands, &c. to which any tithes, arable land, meadow, or pasture belong, unless a third of the old rent be reserved in corn, &c.

The rent reserved upon the last lease is the accustomed rent. *Hard. 326.*

If there be a covenant to pay, which is effectual, it is tantamount to a reservation. *Hard. 326.*

But if a copyhold escheats, or is forfeited, it may be demised with the manor rendring the antient rent, with an augmentation *pro rata*. *5 Co. 5. b. Mo. 199. 759.*

Or, a partition be made, and the rent of each part be reserved *pro rata*. *Co. L. 44. b.*

So, it shall be good if the rent be reserved yearly or half-yearly, where it was before quarterly. *Semb. cont. 5 Co. 5. b. R. acc. 6 Co. 38. a. 2 Cro. 76. R. Cro. Car. 17. Co. L. 44. b.*

Or, if he reserves eight bushels of corn, where it was before one quarter. *5 Co. 5. b.*

So, if he reserves the antient yearly rent; tho' an heriot, fine upon the death of the tenant, or other profit or casualty, not annual, be not reserved; for the statute speaks only of *yearly rent*. *Co. L. 44. b. R. 6 Co. 38. 2 Cro. 76. R. Mo. 759.*

So, if he reserves the antient rent, tho' part of the lands antiently demised for it be excepted. *R. per three J. two cont. and afterwards affirmed in B. R. 1 Mod. 203. 2 Mod. 57.*

If reserved at the antient days of payment, or twenty days after: for that is for the benefit of the successor. *R. 2 Lev. 62.*

So, a lease by a college is not void by the *st. 18 El. 6.* tho' no rent be reserved in corn, where land, meadow, pasture, or tithes of corn are not part of the demise. *R. Sav. 68.*

So, it shall not be intended, that it is not the antient rent, if it be not specially found. *R. 1 Lev. 306.*

And it need not be shewn, that the third part of the rent was reserved in corn, according to *18 El. 6.* *R. 1 Lev. 306.*

So, a lease by the *st. 32 H. 8. 28.* is not enabled to be made of a reversion, nor if a former lease be *in esse*, not surrendered or determined within a year after the new lease. *Co. L. 44. b.*

And such surrender ought to be absolute, and not conditional. *Co. L. 44. b. R. 5 Co. 2. b.*

[The surrender of a prebendary's lease, with a condition, that if the then prebendary did not in a week after grant a new lease, the surrender should be void, is good to warrant a renewal. *Wilson v. Carter*, *H. 17 G. 2. Str. 1201. Contra Co. L. 44. b. R. 5 Co. 2. b.*]

[If dean and chapter seal a lease before the old one is surrendered, it is invalid; and therefore if they re-seal it afterwards, it is only effectual from that time: and a canon elected before the second, and after the first sealing, is entitled to his share of the fine, tho' it was paid before the first. *Winne v. Rampton*, *P. 1747, 3 Atkyns, 473.*]

So, a lease of a reversion, *in futuro*, or concurrent, cannot be made within

within the 14 *El.* 11. for they are all leases in reversion. *R. Cart.* 14, 15. *R. Hob.* 269. *R. Cro. El.* 473. 564. *Cont.* as to a concurrent lease within three years of the former lease expired, *per Hale.* But *R. acc.* as to a lease *in futuro.* 3 *Keb.* 46. 107. 193. 2 *Lev.* 61, 2.

But a bishop may make a concurrent lease for 21 years, if it be confirmed by the dean and chapter, tho' there be a former lease *in esse*, not determined within a year: for the *st.* 1 *El.* does not restrain leases, which do not exceed three lives or 21 years; and therefore, if it has the circumstances required by the common law, the lease shall be good, tho' it be not enabled by the *st.* 32 *H.* 8. *Co. L.* 45. *a.* *R. per ten J.* *Mo.* 108. 1 *Leo.* 148. And this, since the 18 *El.* 11. for a bishop is not there mentioned. *Cart.* 14.

Tho' the former lease has four, or more years to come. *Mo.* 108.

So, a master and fellows of a college, dean and chapter, &c. all restrained by the *st.* 13 *El.* may make a concurrent lease (*concurrentibus iis qua in jure requiruntur*) for years, tho' the former lease be not determined within a year; so that, since the *st.* 18 *El.* 11. it be to be surrendered or determined within three years. *Co. L.* 45. *a.*

So, every lease, not enabled by the *st.* 32 *H.* 8. nor restrained by the *st.* 1 *El.* or 13 *El.*, ought to be made with the circumstances and consent required by the common law. *Co. L.* 45. *a.*

So, a lease of a house in a city, &c. not enabled by the *st.* 14 *El.* 11. shall be good, if it be not within the restriction of the 13 *El.* and 18 *El.* *Semb. Cart.* 15.

So, a lease of a house in a city, &c. pursuant to the *st.* 14 *El.* is not within the *st.* 13 *El.* or 18 *El.* *R. Hob.* 269.

So, a lease by a bishop, or other spiritual corporation sole, shall be good against himself, tho' he does not pursue the directions of the statutes, tho' the statute says, that it shall be *void to all intents*, &c. *Co. L.* 45. *a.* *R.* 3 *Co.* 59. *b.* *R.* 1 *And.* 244.

So, a lease by a corporation aggregate, not pursuant, shall be good against them during the life of the dean, or other head of the corporation. *Co. L.* 45. *a.* *R.* 3 *Co.* 60. *a.* *R.* *Mo.* 875. *R.* 1 *Leo.* 308.

But it shall be void immediately upon the death or removal, &c. of the bishop, dean, or other head. *R.* 10 *Co.* 62. *a.*

And the acceptance of rent by the successor does not make it good for his time. *Cont.* 1 *Rol.* 476. *l.* 15. *Dub. Cro. Car.* 95. *R. acc.* 2 *Cro.* 173. *Dub. Cart.* 16.

So, a lease by a corporation aggregate, which has not an head, shall be void as to themselves. *Hard.* 326.

(G 6.) *A lease by several persons; how it operates.* If parceners or joint-tenants join in a lease, this shall be but one lease: for they have but one freehold. 2 *Rol.* 64. *l.* 20.

If tenants in common join in a lease, it shall be several leases of their several interests. 2 *Rol.* 64. *l.* 15.

So, if *A.* the owner of the land and a stranger join in a lease by indenture; it shall be the lease of *A.* only, and the confirmation of the stranger. *Co. L.* 45. *a.*

So, if *A.* and *B.* join in a lease of their several lands; it shall be several leases of their several estates, and a confirmation by each of the lease of the other. *Co. L.* 45. *a.*

So, if tenant for life, and he in remainder or reversion in fee, join



in a lease; it shall be the lease of tenant for life during his life, and the confirmation of him in remainder or reversion; and after the death of tenant for life, it shall be the lease of him in remainder or reversion. *Co. L. 45. a.*

[But a lease, executed by tenant for life, in which the reversioner who was then under age was named, but which was not then executed by him, is void on the death of the tenant for life; and an execution by the reversioner alone afterwards is no confirmation of it so as to bind the lessee in an action of covenant. *1 Term Rep. 86.*]

So, if tenant *pur auter vie*, and he in remainder or reversion join; it shall be the lease of the tenant for life during the life of *cestuy que vie*, and afterwards the lease of him in reversion or remainder, and the confirmation of tenant for life. *Co. L. 45. a.*

(G 7.) *A lease by estoppel, &c.*] So, if a stranger makes a lease by indenture, it shall be good against himself by *estoppel*: for he cannot say *nil habet in tenementis*. *Co. L. 45. a. Vide Estoppel.*

So, if *A.*, who has right in land, and a stranger join in a lease; it shall be good against the stranger by *estoppel*. *Co. L. 45. a.*

So, a lease by indenture, or fine, shall be good by *estoppel*, tho' there was another lease *in esse* for the same time. *Pl. Com. 434.*

So, lease for years may be good by *estoppel*, for part of the years, for which there is a former lease *in esse*; and for the residue it shall be good in point of interest. *R. 1 Sal. 275.*

If *A.* by indenture leases for years the land of *B.*, and afterwards purchases the land, the lease shall be good against his heir by *estoppel*. *Mo. 20.*

[But where the plaintiff, the lessor, shewed by his own declaration that the lease was void, it was held to be no *estoppel* against the defendant the lessee. *Ludford v. Barber, B. R. H. 26 Geo. 3. 1 T. R. 86.*]

So, a lease shall be good of land in possession.

Or, in reversion, after an estate for life, years, or an estate-tail in possession.

So, a lease to *A.* for 21 years, and the same day another lease of the reversion for 21 years, is good. *Pl. Com. 432. b.*

So, a lease of land in possession, to commence after a lease to *A.* *Pl. Com. 432. b.*

So, *A.* seized in fee may make a lease to commence after his death. *Skin. 543.*

So, a lease for years may be assigned for part of the years. *Skin. 543.*

But a lessee for years cannot assign his term to commence after his death: for he has only a possibility. *Skin. 543.*

#### (G 8.) When a Lease shall commence.

Every lease for years ought to have a certain commencement, and a certain end: and therefore, if it be limited to commence *from the day of the date*, the day after the date the lease begins. *Co. L. 46. b. R. 1 Rol. 387.*

So, generally, if it be *a datu*: for, *a datu*, and *a die datus*, are tantamount. *Co. L. 46. b. R. 2 Rol. 520. l. 37. R. cont. 2 Cro. 135. R. acc. 3 Bul. 203.* But

But when a lease would otherwise be void, *a datu* shall be construed *from the delivery*. *R. per three J. Treby cont. 3 Lev. 439. Sal. 413.*

So, if a lease be made to commence *from the date*, when it has none, or an impossible date; it commences upon the day of the delivery. *Co. L. 46. b.*

So, if it be made to commence from a former lease, when there is no such lease, or such lease is void, or expired, or misrecited in a material point; it commences from the delivery. *Co. L. 46. b. R. Jon. 355.*

So, if a lease be made for 21 years, without saying when it shall commence; it commences upon the day of the delivery. *Co. L. 46. b.*

So, if it be made to commence *from the making*. *Co. L. 46. b. 2 Rol. 520. l. 34.*

Or, *from henceforth*. *Co. L. 46. b.*

Or, *from the sealing and delivery*. *2 Rol. 520. l. 30.*

But if it be *a die confectiois*, it commences the day after the delivery. *Co. L. 46. b.*

So, if a lease be the 25th of *March*, to commence *ab inde* for one year, rendring rent at *Michaelmas* and *Lady-day*; *ab inde* shall be taken exclusive of the day of the date: otherwise, the reservation would be after the term. *R. 2 Rol. 521. l. 10.*

[The words, "from the day of the date," may mean either inclusive or exclusive, according to the context and subject-matter, and the court will contrive it so as to effectuate the deeds of the parties, and not to destroy them. *Pugh v. Leeds, B. R. Dougl. 53. n. 1.*]

#### (G 9.) What shall be a good Commencement,

The commencement of every lease ought to be fixed and determined by exprefs words, or such as may be ascertained by construction of law, or by reference to a certainty. *Co. L. 45. b.*

And therefore, if a lease mentions a time of commencement at a day future or past, it shall be good.

So, if it mentions no time of commencement: for by construction of law it commences at the delivery. *Vide ante, (G 8.)*

So, if a termor leases for a less term, to commence after his death; it shall be a good lease of so many years as remain, after his death, of the first term. *Per Holt, Sal. 413.*

So, if it be limited to commence upon a possible contingency; as, *when A. pays 20 s.* *Co. L. 45. b. 6 Co. 35.*

*Cum post mortem, sive per mortem, sursum-redditionem, seu forisfacturam* of a former lease for years, with a proviso that the lessor might enter if the lessees died within the term, *vacari contingat*: for it commences at the end of the former term. *R. per three J. two cont. 2 Cro. 71. 6 Co. 36.*

So, if it be to commence upon a disjunctive; it shall commence if the one part happens, tho' the other does not. *Semb. 3 Lev. 99.*

So, if it commences upon the death of such an one without issue. *R. 1 Lev. 35.*

So, if the commencement be defeated by any impediment, it may commence after the impediment removed: as, if a man leases to *A.* for 21 years, and afterwards to *B.* the same day by *parol* for 31 years; it shall not commence immediately, because he had not power to lease

during the 21 years before granted, but as a reversion: yet it shall commence after the end of 21 years, for 10 years. *Pl. Com.* 432.

(G 10.) What shall be a good Determination,

The continuance of a lease ought to be certain.

And it shall be certain, where the express number of years is named, or by reference, or matter *ex post facto*, or construction of law, the years may be reduced to a certainty. 6 Co. 35. a.

As, if the limitation be express, for 10, 20, or other number of years. 6 Co. 35. a.

Or, for so many years as A. has in such a manor, who has in it 10 years. 6 Co. 35. b.

As, A. shall name, and he names in the life of the lessor. 6 Co. 35. b.

[A lease from Michaelmas for 7, 14, or 21 years, as lessee shall think proper, is a good lease, at all events, for 7 years. *Ferguson v. Cornish*, T. 33 & 34 G. 2. 2 B. M. 1032.]

(G 11.) When it shall be determined.

If a lease be to A., B., and C. for years, if the said A., B., and C. so long live; if any of them dies, the lease determines. *Per two J.* Dal. 2.

Otherwise, if it be in the disjunctive, if A., B., or C. so long live; for then it continues during the life of the survivor.

Or, if A. and B., or any issue of them, so long live. *R. Cro. El.* 270, (*Vide Co. L.* 225. a.)

So, if a lease be for years, proviso that the lessor may enter if the lessees die within the term; it does not cease by the death of the lessees, till the lessor enters. *R. 2 Cro.* 71.

So, if a lease be for 21 years, and after the 21 years ended for other 21 years, and so from 21 years to 21 years, till 99 years are thence complete; the lessee shall have it for 99 years after the first 21 years. *R. 2 Lev.* 241.

So, if a lease be to A. for one year, & sic de anno in annum, it shall be a lease only for two years. *Mo.* 372.

[A lease for a year, and then for two or three years, as lessor and lessee shall agree, is a lease for two years; and after every subsequent year begun, is not determinable till the end of it. *Harris v. Evans*, H. 23 G. 2. 1 Wilf. 262.]

[A lease in 1785, for three, six, or nine years, determinable in 1788, 1791, 1794, is a lease for nine years, determinable at the end of three or six years by either of the parties giving reasonable notice to quit. *Goodright v. Richardson*, B. R. M. 30 Geo. 3. 3 T. R. 462.]

[In a lease of houses for years, there was an express covenant on the part of the tenant to pay the rent. The houses were burnt down during the term, and rebuilt by the landlord, but the tenant paid no rent subsequent to the time of the fire. After the houses were rebuilt by the landlord, the tenant brought an ejectment to recover the possession. *Per Ld. Mansfield*, it was held, that the landlord was not obliged to rebuild, but that the tenant was obliged to pay the rent subsequent to the time of the fire; and it was left to the jury to consider whether it was not to be presumed that the tenant had abandoned



done the lease at the time of the fire; and they accordingly found a verdict for the defendant. *Pindar v. Ainsley, B. R. cited 1 T. R. 312.*

(G 12.) What shall not be a good Determination.

But it shall not be a good limitation of the determination of a lease, if the reference be to a thing possible, or casual, which has not express certainty; as, *for so many years as an infant en ventre sa mere shall live. Semb. 6 Co. 35. b.*

Or, *for so many years as till issue en ventre sa mere shall come to full age. 6 Co. 35. b.*

So, if a lease be till 20 l. be received out of the profits of land, which is 20 s. a year. *6 Co. 35. b.*

(G 13.) When a Lease shall be void.

But a lease, which cannot take effect in interest except by possibility, if it be not an *esloppel*, shall be void: as, if tenant in fee leases by *parol* to *A.* for 9 years, and the same day to *B.* for 9 years, the lease to *B.* shall be void. *Pl. Com. 432.*

But a lease by a bishop, &c. confirmed by dean and chapter, shall not be void by his death, tho' it be not pursuant to the *st. 32 H. 8.*

Nor, a lease by a parson, or vicar, if it be confirmed by patron and ordinary. *R. 2 Lev. 61.*

So, a lease to *A.* for three lives if the lessor demise to *B.* for life, which term shall commence after the death, surrender, or forfeiture of the three lives, it shall be good, and the words which term, &c. rejected. *R. Cro. El. 269.*

[A lease for any term of years may be created by writing without deed. *Farmer v. Rogers, T. 28 & 29 G. 2. 2 Wils. 26. Per Curiam*, on consideration. *Contra, per Clive and Bathurst* only in court. *Villiers v. Handley H. 30 G. 2. 2 Wils. 49.*]

[A person who has power to grant a concurrent lease within seven years of the expiration of the old one, may grant a lease at any time on the surrender of the old. *Wilson v. Sewell, M. 7 G. 3. 4 B. M. 1975*]

[The acceptance of a new lease is an implied surrender of the old. *Ibid.*]

[But not if the new lease does not pass an interest according to the contract and intention of the parties. *Davison v. Stanley, P. 8 G. 3. 4 B. M. 2210.*]

[A lease void in its creation against a remainder-man does not become valid by his accepting rent, and suffering the lessee to make improvements after his remainder vests in possession. *Doug. 50.*]

[But it is otherwise of a lease voidable only. *Id. 57. n.*]

(G 14.) What Interest the Lessee has before Entry.

If a lease be made to commence immediately, the lessee has in him *interesse termini* before his entry, and may grant it to another. *Co. L. 46. b. 270. b. R. Jon. 8.*

So, if it be made to commence at a future day.

And if the lessee dies before entry, his executor or administrator may enter, *Co. L. 46. b.*

So,

So, the lessee or his executor may enter, tho' the lessor dies before, *Co. L. 46. b.*

So, if a lease be to several persons, and one of them dies, his interest survives. *Co. L. 46. b.*

So, a release by the lessor to the lessee, before his entry, or before his term commenced, extinguishes the rent reserved. *Co. L. 270. a.*

So, if the lessor grants the reversion, and the lessee before entry attorns; the grant of the reversion will be good. *R. Jon. 8.*

What interest a lessee for years has by limitation in perpetuity, or upon trust, *vide in Chancery, (4 G 2. 5.—4 W 21.)*

What estate of a lessee determines by forfeiture, *vide in Forfeiture, (A 1.)*

When he shall be punished for waste, *vide in Waste, (A 2.—C 4, 5.—F 2.)*

#### As to Reservation of Rent upon a Lease.

*Vide Rent, (B 1, &c.)*

#### How Rent shall be recovered by Action.

*Vide Dett (A 5. 7.—B—C—D—E—F).—Rent, (D 1, &c.)*

#### How, by Distress, or Re-entry.

*Vide Distress, per totum.—Condition, (O 3, &c.)—Rent, (D 3, &c.)*

#### (H) Tenant at Will.

(H 1.) Who shall be.

**T**ENANT at will is, when a man lets lands to another without limiting any certain or determinate estate. *Lit. f. 68.*

And it may be by express words; as, if *A.* lets land to another, *quamdiu ambabus partibus placuerit.*

Or, *quamdiu the lessor pleases*: for by implication of law it shall be at the will of both: for it cannot be at the will of the lessor only. *Co. L. 55. a. R. Mo. 775.*

So, if it be, *quamdiu the lessee pleases*: for it shall be at the will of both. *Co. L. 55. a.*

If it be, *de anno in annum quamdiu ambabus partibus placuerit*; after two years it shall be at will. *6 Co. 35. b.*

So, if lessee for years of a house grants all his house to *B.*, without more; *B.* shall have it at his will. *R. 2 Leo. 78.*

If a man grants the rents and profits of land to *B.*, the grantee shall be tenant at will, *Cart. 60.*

So, if a man enters and enjoys land by consent of the owner; he shall be tenant at will to him, tho' there be not any express lease at will: as, if *A.* makes a charter of feoffment to *B.*, and delivers the deed to him, but does not make livery, *B.* shall be tenant at will: for he entred, and had the land by consent of *A.* *Lit. f. 70. 1 Rol. 859. l. 21. Ray. 147.*

So, if *A.* leases for life to *B.*, and does not make livery; *B.* shall be tenant at will. *1 Rol. 859. l. 17.*

So, if tenant in tail covenants upon the marriage of his son, to suffer

suffer a common recovery, to the use of the son in tail, and the son enters, tho' the common recovery was not suffered; he shall be tenant at will. *R. Cro. Car.* 305.

So, if a mortgagee covenants that the mortgagor shall take the profits till default of payment; he shall be tenant at will to the mortgagee. *2. Cro.* 660.

Or, that the mortgagor and his heirs shall take the profits; the heir, after the death of his ancestor, shall be tenant at will.

So if the mortgagor demises to *A.*, his executors and assigns, he shall be tenant at will to the assignee. *Skin.* 424.

So, if he demises to *A.* without more, who assigns to *B.*, he shall be tenant at sufferance to *B.* *Ibid.*

So, if tenant in fee makes a lease to attend the inheritance, and afterwards enters and takes the profit; he shall be tenant at will to his lessee. *R. 1 Sid.* 349. 458. *1 Vent.* 80.

So, if he makes a feoffment to the intent of performing his will, and afterwards takes the profits; he shall be tenant at will to his feoffee. *Lit. f.* 462.

If he makes a feoffment upon trust for *A.*, who enters; *A.* shall be tenant at will to the trustee. *Cart.* 60.

Tho' *A.* be not a party to the deed. *Cart.* 60.

So, if a mortgagor or other who enters by consent, makes a lease for years, and the lessee enters, claiming nothing but his lease; he is not a disseisor; but, if his rent is paid and accepted, he shall be a tenant at will. *2 Cro.* 660. *R. Cro. Car.* 306.

And if the mortgagor enters after the lease determined, he shall be tenant at will again to the mortgagee. *R. 2 Cro.* 660. *Bridg.* 13.

So, if tenant for years continues after his term, and his rent is paid and accepted as before, he shall be tenant at will. *Per Rolle,* *Al.* 4.

So, if *A.* demises a tenement to another for years, excepting the new house for his habitation when he pleases to stay there, and at other times for the use of the lessee; the lessee has the new house as tenant at will. *R. 4 Mod.* 9. 12.

So, if *A.* gives licence to *B.* to take the profits of his land; it shall be a lease at will. *Sal.* 588.

Or, to trade upon his dock; it shall be a lease of the dock: for it is all the profits there. *Ibid.*

If *A.* enters into lands of *B.* claiming to hold them at his will, tho' he enters of his own head, and afterwards *B.* demands rent of him; he shall be tenant at will. *R. 4 Leo.* 35.

[A man who enters and enjoys under a void lease, and pays rent, is a tenant at will, and not a disseisor. *Denn v. Fearnside, M.* 21 G. 2. 1 *Wils.* 176.]

[A parol agreement to lease lands for four years only creates a tenancy at will, and if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff cannot recover. *Goodtitle v. Herbert, B. R. E.* 32 Geo. 3. 4 *T. R.* 680.]

#### (H 2.) Who not,

But if a man enters by colour of a grant or conveyance, which was void, and did not stand with the rule of law; he shall be a disseisor, and not a tenant at will. *R. 2 Co.* 55. b. *Cro. El.* 451. 585.

As,



As, if a feoffment be to *A.* to the use of *B.* and no livery, and *A.* enters: he shall not be tenant at will: for it was not intended to his use. 1 *Rol.* 859. l. 25.

So, if *B.* enters, he is not tenant at will. 1 *Rol.* 159. l. 30.

So, if a feoffment be upon condition to re-enfeoff *A.*, and he enters without assent, he is not a tenant at will. *R.* 2 *Co.* 59.

So, if before the *ft.* 27 *H.* 8. 10. *A.* had made a feoffment to the use of himself, and had entred; he was not tenant at will. 1 *Rol.* 859. l. 35.

So, if a man makes a lease for life, and makes livery, which is void by reason of a commencement *in futuro*; tho' the lessee enters and pays his rent, he shall not be tenant at will: for he claims a freehold. *R.* 1 *Rol.* 662. l. 10. *Cro. Car.* 388.

So, if a conveyance be of land in the parish of *D.* when it lies in the parish of *B.* and the vendee enters; he is not tenant at will. *R.* 3 *Co.* 10. a.

So, if there be a covenant only to make a lease, and before the lease made he enters without assent; he shall not be tenant at will.

So, if a mortgagee covenants, that he will not take the profits till default of payment, and the mortgagor enters immediately; he shall not be tenant at will, but only at sufferance: for it was not agreed that he should take, but that the mortgagee should not take. *R.* 1 *Rol.* 859. l. 40. 2 *Cro.* 660. 2 *Rol.* 242. *Bridg.* 12.

So, if the mortgagee makes an assignment, (which amounts to a determination of the will,) and afterwards the mortgagor continues in possession; he shall be only tenant by sufferance. 3 *Lev.* 388. 1 *Sal.* 246.

So, if the mortgagee enters upon the mortgagor, who afterwards re-enters; the mortgagor is not a tenant at will, but a disseisor: for the entry of the mortgagee was a determination of his will, and the re-entry was wrongful. 1 *Sal.* 246.

So, if the heir of the mortgagor enters, (where the agreement does not extend to the heir,) his entry is wrongful. 1 *Sal.* 246.

So, the king cannot be tenant at will of another. *Mod. Ca.* 248.

#### (H. 3.) What Things a Lessee at Will may do.

A lessee at will may take a release of the inheritance, and thereby his estate is enlarged.

Or, a confirmation for his life, upon which a remainder may be dependent. *R.* 3 *Leo.* 15.

#### (H. 4.) What he ought to do.

A lessee at will ought to pay the rent reserved. *Lit. f.* 72.

And if he does not, the lessor may distrain, or have debt for it. *Lit. f.* 72.

#### (H. 5.) What he need not do.

But a lessee at will need not sustain, or repair the houses demised to him. *Lit. f.* 71.

And therefore, if his house decays, he shall not be punished for waste. *Vide Waste*, (C 5.)

So, if the house be burnt by negligently keeping of his fire, an action

action upon the case does not lie against him. *R. 5 Co. 13. b. Cro. El. 777. 784. 4 Mod. 12. 1 Sal. 19. Vide Action upon the Case, (B 3.)—Action upon the Case for Negligence, (A 6.)*

But if a lessee at will voluntarily burns his house, trespass lies against him. *Cro. El. 784.*

So, if he cuts down trees. *Co. L. 57. a. Vide Trespass, (B 2.)*

(H 6.) What shall be a Determination of the Will.

(H 6.) *Express.*] Tenant at will may be ousted by express words, or by implication. *Co. L. 55. b.*

As if the lessor comes upon the land, and says that the lessee shall not continue over. *Co. L. 55. b.*

If the lessor comes upon the land, he may determine his will in the absence of the lessee. *Co. L. 55. b.*

But words off the land do not determine the will, till notice to the lessee. *Co. L. 55. b. Vide post. (H 9.)*

(H 7.) *Implied.*] So, if the lessor does a wrongful act, it amounts to a determination of the will: as if, without consent of the lessee, he enters and cuts down the trees demised. *Co. L. 55. b.*

Or, puts his cattle into the land.

Or, into a common appendant to a manor demised. *Co. L. 55. b. 1 Rol. 860. l. 45.*

So, if the lessor grants a rent-charge out of the land, it shall be a determination of the will; otherwise the grantee cannot distrain. *Semb. 1 Rol. 860. l. 35. Vide post. (H 8.)*

If he makes a feoffment of the land. *1 Rol. 860. l. 37.*

Or, a lease for years, to commence immediately. *R. Ray. 224. 1 Vent. 247. 2 Lev. 88.*

Tho' it be agreed, that the lease for years shall not take effect till after the rent upon the lease at will was due; yet the lease at will shall be so determined, that debt does not lie for the rent at the day agreed that the lease for years shall have effect. *R. 2 Lev. 88.*

So, if the lessee cuts down trees, pulls down houses, or does voluntary waste; it amounts to a determination of his will. *Co. L. 57. a. 1 Rol. 860. l. 50.*

So, if he grants or assigns his lease to another. *Co. L. 57. a. 1 Rol. 860. l. ult. 4 Leo. 35. Jon. 316.*

And if tenant at will makes a lease for years and the lessee enters, he only shall be the disseisor. *R. Cro. El. 830.*

So, if the lessor or lessee be outlawed, it amounts to a determination of the will. *1 Rol. 861. l. 5. 8. 5 Co. 116. b.*

[An act of high treason shall be an implied determination of the will. *Denn v. Fearnside, M. 21 G. 2. 1 Wils. 176.*]

So, if the lessor or lessee dies.

Or, if *A.* having an estate devised to *B.* at his age of 24 years, till *B.* attains such age, lets it at will, and *B.* dies. *R. Mo. 775.*

So, if the lessor dies, and his heir afterwards enters. *Ibid.*

(H 8.) What not.

But a lawful act upon the land by the lessor, does not amount to a determination of the will: as, if he cuts down trees excepted out of the demise. *Co. L. 55. b.*

So,

So, if the lessor covenants to make a feoffment, it does not amount to a determination of the will, till the feoffment be made. *1 Rol. 860. l. 37.*

So, if he makes a lease to commence at a future day, it does not amount to a determination, till the lease commences in point of interest. *R. 1 Vent. 247. Ray. 224.*

So, an extent does not determine the will, till the *liberate*. *1 Vent. 248.*

Nor outlawry, till seizure. *D. 1 Vent. 248.*

So, an act by the lessor which does not disturb the possession does not amount to a determination: as, a grant of a rent-charge. *Qu. 1 Rol. 860. l. 30. 852. l. 15. Vide ante, (H 7.)*

So, a grant by the king of an office, after the surrender or forfeiture of B., who has the same office *durante bene placito* of the king; does not determine the will of the king. *R. Skin. 446. 580.*

Nor, an act by a stranger; as, if he enters and takes the profits. *2 Cro. 660. Per two J. 1 Rol. 861. A.*

So, if he enters with the privity of the lessor, or lessee. *2 Cro. 660. Per three J. Yel. 74.*

So, if a woman lessor or lessee at will takes husband; that does not amount to a determination of the will. *Co. L. 55. b. R. 5 Co. 10.*

Or, if husband and wife demise land of the wife at will, and the husband dies. *Co. L. 55. b. 5 Co. 10. b.*

So, if a lease at will be made by several, and one of the lessors dies. *Ibid.*

Or, if one of the lessees dies. *Co. L. 55. b. Dub. Dy. 269. b. Acc. 5 Co. 10.*

So, if a woman lessor at will takes a husband, the wife cannot afterwards determine the will without her husband. *5 Co. 10. a.*

So, if husband and wife lease at will, or are lessees at will; the wife cannot determine the will: for she has submitted her will to her husband. *5 Co. 10.*

(H 9.) At what Time the *Ouster* shall be.

A lessee at will may be ousted when the lessor pleases.

Or, his estate may be determined when the lessee pleases.

But if the lessor determines his will by words off the land, it is not a determination till the lessee has notice. *Co. L. 55. b. 1 Vent. 248. Vide ante, (H 6.)*

So, if he does an act inconsistent with the estate of the lessee. *Per Hale, 1 Vent. 247.*

So, a lessee paying rent at *Michaelmas* and *Lady-day*, cannot determine his will after the commencement of the half year, without paying the rent to the next feast: for that would be a wrong to the lessor. *D. Kel. 65. b. Per two J. Yel. 74. Dub. 1 Rol. 861. b. R. 1 Sid. 339. Per Holt, Sal. 413.*

Or, if rent be payable quarterly, after the commencement of the quarter. *Per Rolle, Al. 4.*

Or, if it be a lease *de anno in annum quamdiu ambabus partibus placuerit*, after the commencement of the year: for it is not merely at will; for after a year commenced, the lessee ought to have it for the whole year. *R. 2 Jon. 5. R. inter Simmons and Pasbley, B. R. T. 2 Jac. 2. Sal. 413, 414.*

So,



So, if the lessor determines his will after the land is sown, the lessee shall have free ingress and egress to cut and carry away the corn when it is ripe. *Lit. f.* 68. *Sal.* 413. *Vide Biens*, (G 2.)

So, if the corn be cut, and not carried off the land. *Co. L.* 55. b.

So, he shall have free ingress and egress for a reasonable time to remove his goods and utensils out of his house. *Lit. f.* 69.

So, by the custom of *London*, a will shall not be determined without half a year's warning, if the house be above 40 s. a-year, and, if under such rent, without a quarter's warning. *Skin.* 649.

And, till that time elapses, the lessee cannot be ousted by ejectment, &c. *Dub. Skin.* 649.

[Half a year's notice must be given to any tenant at will, or to his executor, before the end of which ejectment will not lie. *Parker v. Constable*, M. 10 G. 3. 3 *Wils.* 25. *Vide Pleader*, (2 Z 2.)]

## (I) Tenant by Sufferance.

### (I 1.) Who shall be.

**T**ENANT by sufferance is he who enters by lawful demise or title, and afterwards wrongfully continues in possession: as, if tenant *pur auter vie* continues in possession after the death of the *cestuy que vie*. *Co. L.* 57. b. 2 *Leo.* 46. 3 *Leo.* 153.

Or, if tenant for years continues after the term is expired, or determined. *Co. L.* 57. b. 2 *Leo.* 46.

So, if a devisee for life, upon condition that if he do, &c. his estate shall cease, continues in possession after the condition broken; he shall be a tenant by sufferance. *Per Gawdy*, 3 *Leo.* 153. 2 *Leo.* 142.

So, any, who continues in possession, after a particular estate is ended, without agreement. *Cart.* 64.

### (I 2.) Who not.

But none shall be tenant by sufferance against the king. *Co. L.* 57. b. 2 *Leo.* 142. for if his tenant holds over, he shall be an intruder. *Hard.* 25.

So, if a guardian continues in possession after the full age of the heir; he is not a tenant by sufferance, but an abator. *Co. L.* 57. b. 271. a.

So, if a custom is alleged, that a lessee for years shall continue half a year after his term; it will not be a good custom. *Mo.* 8.

So, now, by the *st.* 4 *Geo.* 2. 28. if tenant for life, or years, or in possession under, or by collusion with him, hold over after demand and notice in writing for delivering possession by the lessor, &c. or his agent, he shall pay at the rate of double his rent for the time he so continues possession; to be recovered by action of debt, on which special bail shall be required, and no relief in equity.

[By the *st.* 11 *G.* 2. 19. tenants giving notice to quit, and not delivering possession at the time contained in such notice, shall pay double rent.]

## (K) Estates undivided.

## (K 1.) Joint-tenants.

(K 1.) *Who are.*] ESTATES are several, or undivided. *Vide*  
*Chancery, (3 V 3.)*

Estates undivided are by descent only, as estates in coparcenary;  
*de quo, vide Parceners, (A 1, &c.)*

Or, by purchase only upon a joint title, as estates in joint-tenancy. *Co. L. 188. b.*

Or, estates in common; which may be by descent, purchase, or prescription. *Co. L. 188. b.*

Joint-tenants are, when a man enfeoffs or otherwise conveys lands or tenements to two or more jointly. *Vide Lit. f. 277.*

And if the conveyance be to them and their heirs; they are joint-tenants in fee. *Co. L. 180. a.*

So, if several make a *disseisin*, to the use of themselves; they are joint-tenants. *Lit. f. 278.*

So, if several abate, intrude, or usurp upon another; they are joint-tenants. *Co. L. 181. a.*

So, if *A.* disseises another to the use of several persons, who agree to it. *Co. L. 180. b.*

If an estate be to *A.* and the heirs of his body, remainder to the right heirs of *B.* who has two daughters, and dies; the daughters take jointly, and not as parceners: for they take by purchase. *R. 3 Leo. 14.*

If a conveyance be to several for life, or *pur autre vie*; they are joint-tenants for life. *Co. L. 180. a.*

And tho' there be several determinations of their estate, yet they may be joint-tenants: as, if a rent be granted to *A.* and *B.* till *A.* marries, and *B.* be advanced to a benefice.

Or, *habendum* to them, *viz.* to *A.*, till marriage, and to *B.* till advancement; they are joint-tenants in the mean time: and if *A.* dies before marriage, the rent survives; if after, it ceases for a moiety. *Co. L. 180. b.*

For tho' there be a severance by the *viz.* or *habendum*; for that will be repugnant: as, if two acres be granted to *A.* and *B.*, *habendum* the one to *A.* and the other to *B.* *Hob. 172. 1 Sal. 391. Vide post. (K 2.)*

So, if a rent of 40 *l.* be granted to *A.* and *B.* equally to be divided, *viz.* 20 *l.* to each for life. *R. 1 Sal. 390.*

So, they may be joint-tenants, tho' there be not an equal benefit of survivorship: as, a grant to *A.* and *B.* for the life of *B.*; if *A.* dies, the estate survives; not if *B.* dies; for it is determined. *Co. L. 181. b.*

So, tho' the estates commence at several times: as, if *A.* disseises another to the use of several, who agree to it, one at one time, another at another. *Co. L. 188. a. Pol. 373.*

If a feoffment be to the use of himself and such wife as he shall afterwards marry, for life; they are joint-tenants. *Co. L. 188. a.*

So, tho' there be several inheritances; as, if a conveyance be to two men and the heirs of their bodies; they have a joint estate for life, for the words, *to them*, are joint; tho' the inheritance of necessity

cessity shall be several, because they cannot have one; but several heirs of their bodies. *Lit. f. 283. Vide post. (K 2.)*

Or, to two women and the heirs of their bodies. *Lit. f. 284.*

Or, to two men and a woman and the heirs of their bodies; or *contra. Co. L. 184. a.*

So, if it be to a man and a woman who cannot intermarry: as, to *A.* and his mother, or sister, or aunt, &c. *Co. L. 184. a.*

So, if land be conveyed to *A.* and *B.* and the heirs of *B.*, they are joint-tenants for life. *Lit. f. 285. R. Cro. El. 470. 2 Co. 60. b.*

Tho' it be to *A.* and *B. habendum successive. R. 1 Leo. 318. 11.*

So, there may be joint-tenants of the inheritance, tho' the estates in possession are several: as, if joint-tenants make several leases, or gifts in tail, and afterwards grant the reversion to two and their heirs; they are joint-tenants of the reversion in fee. *Co. L. 183. b.*

So, if a man conveys to *A.* and *B.* and the heirs of their bodies, remainder to them and their heirs; they are joint-tenants of the fee: for they take the remainder as a new purchase. *Co. L. 184. a.*

[If a copyhold be surrendered to husband and wife and the survivor, and after the death of the survivor, to the right heirs of both, this vests a fee-simple in the husband and wife by entireties, and the husband cannot alien or devise any part of it, but on his death the whole survives to the wife. *2 Bl. Rep. 1211.*]

So, there may be joint-tenants of a chattel; as, if a man leases to several persons for years. *Lit. f. 281.*

So, if a man gives an horse, or other goods and chattels to divers persons; they are joint-tenants of them, and the survivor shall have the whole. *Lit. f. 281.*

Tho' they are *choses in action*: as, if a man makes an obligation, covenant, or other contract, to divers; they are joint-tenants of the debt, or duty. *Lit. f. 282.*

Tho' a chattel real or personal be given to a man in a natural capacity, and to another who has a politic capacity, as a bishop, abbot, &c.; for he takes chattels in his natural, and not his political capacity. *Co. L. 190. a. Vide post. (K 2.)*

Or, if a chattel real be given to a *feme-covert* and another. *R. Pl. Com. 418. b. Vide post. (K 2.)*

So, there may be joint-tenants of a right: as, if joint-tenants are disseised, they remain joint-tenants of the right. *Co. L. 188. a.*

If two women take husbands, who alien in fee, and die, the women are joint-tenants of the right. *Co. L. 188. a.*

If two joint-tenants within age make a feoffment, and one dies; the survivor may enter, or have a *dum fuit infra atatem* for the whole. *Co. L. 337. b.*

And a right of entry and of action may stand in jointure: as, if husband and wife and *A.* are joint-tenants, and the husband aliens the whole, and dies; this was a discontinuance to the wife, and she had only a right of action, and a *disseisin* to *A.* who may enter: yet the wife and *A.* are joint-tenants of the right. *Co. L. 188. a. Vide post. (K 2.)*

And joint-tenants of a right shall be joint-tenants again, if they recover. *Co. L. 188. a.*

Tho' they recover by several actions; as, if women, joint-tenants of a right, recover by several writs of *cui in vita.* *Co. L. 188. a.*



If joint-tenants being disseised, one of them (his companion being summoned and severed) recovers a moiety by one assise, and the other by another assise. *Co. L. 188. a.*

If joint-tenants and to the heirs of one of them, being disseised, one of them recovers by writ.

If they lose by default, and one of them recovers by writ of right, the other by *quod ei deforceat*. *Co. L. 188. a.*

[The possession of one joint-tenant is the possession of the other, so far as to pervert the statute of limitations. *Ford v. Grey, B. R. H. 2 Ann. 1 Salk. 285.*]

(K 2.) *Who are not.*] But if any have lands or tenements by several titles, they are tenants in common, and not joint-tenants; or, if they are seised in several rights: as, if lands be given to two corporations and their successors. *Vide post. (K 8.)—Chancery, (3 V 4.)—Devise, (N 8.)*

Or, to two corporations sole, regular, or secular, as two abbots, bishops, &c.; for each is seised in right of his abbey, bishopric, &c. *Lit. f. 296.*

Or, to two parsons and their successors; and each is seised in right of his several church.

So, if they be given to a man in his natural, and to another in his politic capacity: as, to *A.* and such an abbot, bishop, parson, &c. *Lit. f. 297. Vide ante, (K 1.)*

To the king and a subject. *Co. L. 190. a.*

So, if an obligation, &c. be made to *A.* and a corporation, it does not survive if *A.* dies. *Ley, 82.*

If a chattel personal be given to *A.* and a *feme-covert*. *Pl. Com. 418. b. Vide ante, (K 1.)*

So, if lands be given to two and the heirs of their bodies; the inheritance in tail is several, and not joint: for of necessity they must have several heirs. *Lit. f. 283, 284. Vide ante, (K 1.)*

So, if land be given for life, remainder to the right heirs of *A.* and *B.*, their heirs are not joint-tenants. *Co. L. 188. a.*

So, if a remainder be to the heirs male of *A.* and *B.*, they have several estates-tail. *R. Cro. El. 220. 1 Leo. 212.*

So, if a corody be granted to two and their heirs; this, being uncertain in its nature, shall amount to a grant of a several-corody to each. *Co. L. 190. a.*

So, if a man enfeoffs another of a moiety, third part, &c. of his land, without limiting any part in certain; the feoffee shall have it with him in common. *Lit. f. 299.*

So, if lands given by joint words are afterwards severed in the *habendum*; as, a gift to *A.* and *B. habendum* a moiety to one and his heirs, and the other moiety to the other and his heirs, they are tenants in common. *Lit. f. 298. Vide ante, (K 1.)*

So, a lease for life, or years, to two, *habendum* a moiety to one, and the other moiety to the other. *Co. L. 183. b.*

Or, *habendum* to the use of one for life, and afterwards to the use of the other. *Semb. 1 Leo. 318.*

So, if a man covenants to stand seised to *A.* and *B. equally to be divided*, and their heirs; they are tenants in common of the inheritance, as well as of the estate for life. *2 Vent. 365, 6.*

If an estate be limited to *A.* and *B.* *equally divided*, or, *equally to be divided*, it is all one; for they are tenants in common. 2 *Vent.* 366.

[If *A.* seised in fee conveys to trustees to uses, to the use of his children and their heirs, *equally to be divided amongst them*, it is a tenancy in common, as well as in a will. *Goodtitle v. Stokes*, *H.* 26 *G.* 2. 1 *Wils.* 341.]

If a copyhold be surrendered to five *to be equally divided*, and their respective heirs; they are tenants in common. *R. per two J. Holt cont. H.* 12 *W.* 3. *inter Fisher and Wigg*, 1 *Sal.* 391.

If a devise be to his younger children *share and share alike*. *R. Co. Parl.* 210.

If a copyhold be granted to three, *habendum successive*. *Semb. 1 Leo.* 318.

So, if a parcener or joint-tenant conveys his part to *A.*, he and the other parcener or joint-tenant are tenants in common; for they claim by several titles. *Lit. f.* 292. 294, 295. 309.

Be the conveyance in fee, in tail, or for life. *Lit. f.* 300, 301, 302.

So, if both parceners, or joint-tenants convey, &c. the feoffees, or grantees, are tenants in common. *Lit. f.* 295. 300.

So, if there be divers joint-tenants, and one of them releases his part to one of his companions; he is tenant in common for that part with his other companions. *Lit. f.* 304.

So, a man may prescribe for him and his ancestors, to hold in common with *B.* and his ancestors. *Lit. f.* 310.

So, an estate of freehold or inheritance cannot stand in jointure with a term for years; and therefore, if lands are given to *A.* and *B.*, *habendum* to one for life, to the other for years; they are not joint-tenants. *Co. L.* 188. *a.*

If a devise be to *A.* till *B.* attains full age, and then to *A.* and *B.*, there cannot be a term for years in *A.* and a freehold to *B.*, and therefore the term shall be merged, and they are joint-tenants immediately. *Semb. Cro. El.* 532.

So, a right of action, or entry, cannot stand in jointure with a freehold, or inheritance, in possession: and therefore, if husband and wife and *A.* are joint-tenants, and the husband aliens, and dies; the wife and *A.* are not joint-tenants. *Co. L.* 188. *a.* *Vide ante*, (K 1.)

So, by the custom of merchants, if they, as joint-merchants, have chattels personal or *choses in action*; they are not joint-tenants of them. *Co. L.* 182. *a.* 2 *Brownl.* 99.

And this extends to shopkeepers, as well as other merchants; for there are four species of merchants, and all within this custom; *viz.* merchant-adventurers, dormant, travelling, and resident. 2 *Brownl.* 99.

(K 3.) *When a joint estate survives.*] If there are joint-tenants in fee, and one dies; the survivor shall have the whole in fee: for it is the nature of joint-tenancy, that the survivor shall take the whole if the jointure continues. *Lit. f.* 280.

[If a joint estate is assigned in trust, and one of the *cestuy que trust* dies, the trust survives for the benefit of the surviving *cestuy que trust*, against the creditors of the deceased, in equity as well as law. *Rex v. Williams*, *H.* 1735, *Bunb.* 341.]

So, if there are joint-tenants for life, and one dies; the other shall have the whole by survivorship.

Tho' there are several inheritances limited upon the estate for life. *Lit. f.* 283.

So, if one joint-tenant enters into religion, which is a civil death; the other shall have the whole by survivorship. *Co. L.* 181. *b.*

And the survivor shall take, tho' the other devises his part; for the devise does not take effect till the death of the testator; and immediately upon his death, the land survives. *Lit. f.* 287. *Vide Devise*, (N 8. 21.)

If a woman, joint-tenant, takes husband, and dies; her estate survives; and does not go to the husband. *Co. L.* 185. *b.* *Vide Baron and Feme*, (E 2.)

So, the survivor shall take, tho' the jointure was severed by a discontinuance, a lease for life, &c. if it be afterwards re-continued, &c. before the death of any of the joint-tenants. *Co. L.* 193. *a.*

(K 4.) *When not.*] But survivorship is the peculiar privilege of joint-tenants. *Co. L.* 131. *a.*

And therefore, an estate in parcenary, or in common, does not survive.

Tho' a lease was express to *A.* and *B.* and the survivor of them, and afterwards *A.* grants his part to *D.*, who is thereby tenant in common with *B.*, for *expressio eorum, qua tacite insunt, nihil operatur*. *Co. L.* 191. *a.*

So, a bare trust, or authority, does not survive. *Vide Co. L.* 181. *b.*

(K 5.) *If the jointure does not continue, what shall be a severance; what not.*] So, there never shall be a survivorship, if the estate does not continue in jointure, at the death of him who dies first. *Co. L.* 188. *a.* 193. *a.* *Vide Chancery*, (3 V 5.)

And therefore, if one joint-tenant conveys his part to a stranger, or releases to his companion; the jointure is severed, and the estate does not survive.

Tho' they are joint-tenants in fee, and one of them conveys only for life: for the freehold being severed, the reversion upon it is also severed. *Lit. f.* 302.

Tho' his conveyance was only for his own life, which determines at his death, when the survivor ought to take. *Semb. Co. L.* 193. *a.*

So, if joint-tenants in fee join in a lease to *A.* and a corporation sole for life: for now the reversion, depending upon several freeholds, is several. *Co. L.* 191. *b.* *Vide ante*, (K 2.)

So, if a wife, joint-tenant, takes husband, who makes a feoffment, &c. the jointure is severed during the continuance of the discontinuance: for a right of action cannot stand in jointure with a freehold, or inheritance in possession. *Vide ante*, (K 2.)

So, if joint-tenant for life makes a feoffment, or grant in tail, or lease *pur autre vie*, which amounts to a *disseisin*, and divests the reversion; the jointure is severed. *Co. L.* 191. *b.* And this shall be a forfeiture. *Vide Forfeiture*, (A 1.)

So, if a joint-tenant within age, makes a feoffment; the jointure is severed, tho' the feoffment was voidable. *Co. L.* 337.

So,



So, if one joint-tenant levies a fine of the whole; tho' it be to the old uses. *Mod. Ca.* 45.

So, if there be two joint-tenants for life, and the one levies a fine *jur concessit* to *A.*, and dies; his moiety does not survive, but goes to him in reversion. *R. Jon.* 55.

So, if a lease be to two for their lives; and by another conveyance, the lessor grants the reversion to them and the heirs of their bodies; the jointure is severed: for the estate is executed, and they are tenants in common in tail in possession. *Co. L.* 182. *b.* *Vide ante*, (B 18.)

So, if a reversion be granted to one of the lessees, in fee, or in tail: for the reversion is executed for a moiety. *Co. L.* 182. *b.*

So, if a reversion be granted to a lessee and stranger, and their heirs. *Co. L.* 182. *b.*

So, if a reversion descends to a joint-tenant. *R. 2 And.* 202. *Cro. El.* 743. *R. Cro. El.* 470. 481. 2 *Cro.* 60. *b.*

So, if there be a lease for life, and the lessor grants the reversion to two in fee, and the lessee grants his estate to one of them; the jointure is severed, and the estate executed for a moiety. *Co. L.* 183. *b.*

Or, if the lessee grants to one of them and a stranger. *Co. L.* 182. *a.*

So, if there be joint-lessees of a term, and one of them assigns part of his term to the other; it shall be a severance of the jointure for the whole. *Cro. El.* 33.

So, if one of them mortgages his part. *R. 1 Sal.* 158.

So, if there be two joint-tenants of an advowson, and they agree to present by turn, and that one shall have one moiety, and the other the other moiety, and this is executed by a presentation by each; the jointure is severed. *R. Carth.* 506.

So, if there be joint-tenants for life, and one leases for years; it shall be a good severance during the term. *Dy.* 187. 2 *Cro.* 417.

So, if he leases his part to commence at a future day. 2 *Cro.* 91.

Or, to commence after his death, during the life of his companion. *R. 2 Cro.* 91. *Mo.* 776. 2 *Rel.* 89. *l.* 5.

So, if he leases for years, if he or his companion live so long. *R. 2 Cro.* 377. *Bridg.* 43.

If husband and wife and *A.* be joint-tenants, and the husband and wife make a lease for years, if they or *A.* live so long; tho' the lease is voidable by the wife, yet if the husband and wife die without avoiding it, it shall be good against *A.* surviving: for the severance continues. *R. Bridg.* 43.

But if one joint-tenant makes a lease for years, this does not sever the jointure as to the freehold. *Co. L.* 185. *a.*

So, if two joint-tenants in fee make a lease for life, and the lessee surrenders to one of them: for this enures to both. *Co. L.* 192. *a.*

If a woman, joint-tenant, takes husband, it is not a severance of the jointure. *R. Pl. Com.* 418. *b.*

Otherwise, where a woman, joint-tenant of a personal thing, takes husband. *Ibid.*

Yet if a joint-tenant for years makes a lease for a less term; that severs the jointure, and the term does not survive. *Co. Lit.* 192. *a.*

(K 6.) *Joint-tenants how seised.*] Joint-tenants are seised *per my & per tout*. *Lit. f.* 288.

When husband and wife are seised by moieties, or by entireties, *vide Baron and Feme*, (D 2, 3.)

But joint-tenants have a right only to a moiety. *Vide Co. L.* 186. a.

And therefore, if one makes a feoffment, gift, or demise of his part; only a moiety passes. *Co. L.* 186. a.

So, if one bargains and sells his lands, and before enrolment the other dies; yet only a moiety passes. *Co. L.* 186. a. 2 *Cro.* 53. *Cro. Car.* 217. *Mo.* 776.

If a lease be by all, rendring rent to them, and one does not seal it; only a moiety passes. 1 *Vent.* 136.

If all join in a feoffment, each gives but his part. *Co. L.* 186. a.

And therefore, if a feoffment be upon condition, that upon breach one shall enter into the whole; yet he shall enter only into his part. *Ibid.*

And if one feoffor dies, the feoffee cannot plead the feoffment of the survivor: for each gave only his part. *Co. L.* 186.

So, every joint-tenant loses, or forfeits only his part. If one be an alien, the king, upon office, shall have only a moiety. *Co. L.* 186. a.

If one be a villein, the lord shall enter but into a moiety. *Ibid.*

So, the one may demise his part for years, or at will, to his companion. *Ibid.*

Or, make his companion his bailiff of his part. *Ibid.*

And maintain account against him in such case. *Co. L.* 186. a. *Vide post.* (K 8.)

(K 7.) *What charges bind the survivor.*] So, if one joint-tenant does a thing which gives to another an estate, or right in the land, it binds the survivor: as, if a joint-tenant in fee, or for life, makes a lease for 40 years. *Lit. f.* 289. *Vide Chancery*, (3 V 7, &c.)

So, if he leases to commence *in futuro*, and dies before the commencement. *Ibid.*

So, if he leases for years the vesture or herbage of the land: for such lessee has a right to the land. *Co. L.* 186. b.

And the survivor shall not have the rent upon a lease for years, tho' he has the reversion. *Co. L.* 185. a.

So, if he acknowledges a statute, recognizance, or judgment, and execution be sued in his lifetime; that binds his companion who survives. *Co. L.* 184. b.

So, if there be a recovery against him, tho' execution be not sued in his lifetime. *Co. L.* 185. a.

But if a joint-tenant grants a rent-charge, and dies; this does not bind the survivor: for he claims *paramount* the charge, and may plead a feoffment to him, without naming his companion. *Lit. f.* 286.

So, if he grants common, *estovers*, a corody, &c. *Co. L.* 185. a.

So, if he acknowledges a statute, recognizance, or judgment, and dies before execution. *Co. L.* 184. b.

Or, be indebted to the king. *Co. L.* 185. a.

So, if he contracts to make a lease for years; that does not bind the survivor.

Or, grants, that if *A.* pays so much at *Michaelmas*, he shall have it for years. *Co. L.* 185. a.

So,

So, if he takes a lease, by indenture, of his own land, from a stranger; the survivor is not bound by this *estoppel*. *Co. L. 185. a.*

So, if a joint-tenant grants the part of his companion, it shall be void, tho' he survives; for it was in contingency. *R. 2 Cro. 91. Mo. 776.*

But if a joint-tenant grants a rent-charge, &c. and afterwards releases to his companion; he shall hold subject to the charge, tho' he survives; for he does not claim by survivorship, but under the grant. *Co. L. 185. a.*

How a conveyance enures by one joint-tenant to another, *vide Release*, (B 4.—D 1, &c.)

(K 8.) Tenants in common.

Tenants in common are those who claim by several titles, or in several rights tho' by one title, and have their possession in common. *Co. L. 189. Vide ante*, (K 2.)

And they may be by descent, purchase, or prescription. *Co. L. 188. b.*

If tenant in tail to him and the heirs of the body of his wife, has issue a daughter, and afterwards another daughter by another venter, discontinues, and disseses the discontinuee, and dies; his daughters are tenants in common by descent; for the eldest is remitted to a moiety; and therefore they are not parceners; for they claim by several titles. *Co. L. 349. b.*

Tenants in common have a several right to the freehold and inheritance.

And therefore, in an action real, or which concerns the title, they ought not to join, except it be for an entire thing. *Vide Abatement*, (E 10.)

So, they have a several right and title to a moiety of the things which they hold in common: and therefore, if one dies, his moiety does not survive, but goes to his heir; or, if it be a chattel, to his executor or administrator.

And one of them may enscoff his companion of his part. *Co. L. 200. b.*

If one levies a fine, makes a feoffment, &c. of the whole; his moiety passes.

[Tenants in common cannot make a joint lease. *Heatherly v. Weston*, P. 4 G. 3. 2 *Wilf.* 232.]

If one actually ousts his companion of the possession, the other may maintain an ejectment against him. *Lit. f. 322.*

[Confession of lease, entry and ouster, is sufficient on an ejectment, in the case of a tenant in common, without proof of actual ouster. *Oates v. Brydon*, P. 6 G. 3. 3 *B. M.* 1895.]

So, if one ousts the other of his ward, or other chattel real, the other shall have ejectment of ward against him. *Lit. f. 323.*

So, if one tenant in common destroys the flight of a dove-cote, the other shall have trespass. *Co. L. 200. a.*

Or, destroys all the deer in their park, &c. *Co. L. 200. b.*

Or, removes the merestones *pro metis & bundis terrarum suarum*. *Co. L. 200. b.*

If one disturbs the other in the setting up of hurdles for their foldage. *Co. L. 200. b.*



So, if one tenant in common of a wood, turbary, piscary, &c. does waste against the will of the other; he shall have waste against him. *Co. L. 200. b.*

If one corrupts the water, the other shall have an action upon the case. *Co. L. 200. b.*

If one will not repair their house, mill, &c. the other shall have a writ *de reparatione faciendâ*. *Co. L. 200. b. F. N. B. 127.*

If one makes the other his bailiff of his part, as he may, he shall have account against him. *Co. L. 200. b. Vide ante, (K 6.)*

But their occupation is in common *per my & per tout*: and therefore, the one shall not have ejectment against the other, without an actual ouster. *Co. L. 199. b. R. Cro. El. 220. 1 Leo. 212. D. 1 Sal. 391, 2. Vide Coup. 217.*

So, the one cannot disseise the other, without an actual ouster. *R. 1 Sal. 392.*

So, if the one takes an entire chattel real, as the body of his ward, villein, &c. the one may take him back, but shall not have remedy by action. *Co. L. 200. a.*

So, if the one takes a chattel personal entire, or not entire; the other may retake it when he has an opportunity, but has no remedy by action. *Co. L. 200. a.*

[One tenant in common cannot avow *alone* for taking cattle *damage-feasant*, but he ought also to make cognizance as bailiff of his companion. *Cully v. Spearman, C. P. H. 35 Geo. 3. 2 H. Bl. 386.*]

[Neither can he maintain an action on the case in nature of waste against another tenant in common, (in possession of the whole, having a demise of the moiety from the first,) for cutting down trees of a proper age and growth for being cut. *Martyn v. Knowllys, B. R. H. 39 Geo. 3. 8 T. R. 145.*]

So, if an estray, or other thing belonging to a manor, which they have in common, happens.

So, if *A.* has a ship in common with *B.*, and disposes the whole to another; no remedy lies by action against *A.* *R. 1 Lev. 29.*

When partition shall be made between joint-tenants, and tenants in common, and how, *vide Parceners, (C 1, &c. 6. — Pleader, (3 F 1, &c.)*

When they shall join in a suit or be jointly sued, and when not, *vide in Abatement, (E 9, 10.—F 5, 6.)—Chancery, (3 V 1, &c.)*

What words in a devise, &c. make an estate in common, *vide ante, (K 2.)—Devise, (N 8.)—Chancery, (3 V 4.)*

## ESTOPPEL.

### (A) Estoppel; What shall be.

(A 1) By Matter of Record.

**E**STOPPELS in general are not to be favoured, they are to extend only as far as the positive rules have gone, because the tendency of them is to prevent the investigation of truth. *Per Id. Kenyon C. J. Rex v. Lubbenham, B. R. E. 31 Geo. 3. 4 T. R. 254.* An

An *estoppel* is, when a man is concluded, by his own act or acceptance, to say the truth. *Co. L. 352. a.* [*Vide 2 T. R. 169.*]

And it may be by matter of record, of writing, or *in pais*. *Co. L. 352. a.*

By matter of record; as, if the king by his letters patent grants lands to *B.*, claiming nothing in the freehold; *B.* cannot afterwards say against the king, that he was enfeoffed by *A.* *1 Rol. 864. l. 6.*

So, if a man levies a fine, or suffers a recovery to *A.* of the land of *B.* in the name of *B.*, it shall be an estoppel to *B.*, and he cannot avoid it without a writ of *disceit*; for he cannot aver against the record. *1 Rol. 863. l. 17. 20. 22.*

If a man acknowledges a deed to be inrolled in court, and it is inrolled of record; he cannot afterwards say, *non est factum*. *R. 39 H. 6. 32. b. 1 Rol. 862. l. 12.*

Tho' it be acknowledged by his attorney for him, and not in person. *R. 39 H. 6. 32. b.*

Tho' the attorney had no special authority to do it. *R. 39 H. 6. 32. b.*

If *A.* levies a fine of the land of another, he shall be estopped to say, *partes finis nihil habuerunt*. *Jon. 459.*

So, a man may be estopped, by pleading upon record: as, if a *scire facias* be upon a judgment in *Trinity* term, and *nul tiel record* is pleaded, and judgment thereupon; the defendant cannot afterwards say, that the judgment was in *Michaelmas* term. *R. 1 Sal. 276.*

So, if *A.* by deed be bound that he will not sue *B.*, and a breach is assigned, that he sued an original, and at the return in bank, *obtulit se versus B. in placito præd.*; he cannot plead, that he did not sue *modo & forma*: for he is estopped by the record. *1 Rol. 863. l. 30.*

In waste against a lessee of the demise of the plaintiff, if the defendant abates the writ by plea, *that the demise was by the plaintiff and another*; in another action by them he shall be estopped to say, that the lease was only by one. *1 Rol. 8. a. l. 10.*

If a man by plea confesses a tenure *in capite*, and then alleges licence of alienation; he cannot say upon another alienation, that he does not hold *in capite*. *4 Inst. 111.*

If in a *nuper obiit*, or *rationabili parte*, by one parcener against another, the defendant disclaims in blood, and claims by purchase, the plaintiff shall have a writ of *mortd'ancestor* for the whole. *Co. L. 164. b.*

So, a man may be estopped by an imparlance, or continuance upon record. *Co. L. 352. a.*

Or, by any confession or admission upon record. *Co. L. 352. a.*

So, a man may be estopped by a verdict upon record: as, in trespass, if the defendant prescribes for common, and the plaintiff traverses the prescription, the defendant may say, that in a former action by the plaintiff against the defendant, the same prescription was found against the plaintiff. *Semb. Sho. 28.*

So, a man may be estopped, by not denying a matter alleged upon record: as, if *A.* be seised in fee, and *B.* brings waste against him, supposing him in of his demise; tho' *A.* pleads, *no waste done*, and it be found for him, he shall be estopped to say, that he is not in of the demise of *B.* *1 Rol. 864. l. 15.*

If a prior prays in aid of his patron, and the plaintiff says, *that he has a convent and common seal*; if he does not deny it, but demurs, whereby

whereby he is ousted of aid, he cannot afterwards say, that he has no convent or common seal, when he did not deny it before. 1 Rol. 864. l. 40.

If the defendant prays in aid of the reversioner, and the plaintiff says, *that he is seised in fee*, which he does not deny, whereby he is ousted of aid; he shall not afterwards say, that he is tenant for life. 1 Rol. 864. l. 45.

And matter of estoppel in a count, (tho' it be but by way of supposal,) after judgment, concludes the parties in another action. Co. L. 352. b. *Vide post.* (E 5.)

So, a matter expressly alleged in a plea, replication, or other pleading, after nonsuit, as well as after judgment. Co. L. 352. b.

But after a nonsuit, a matter of supposal in the court, does not estop. Co. L. 352. b.

[If the estoppel appears on the record, it need not be replied, but advantage may be taken of it on a general demurrer. *Palmer v. Ekins*, M. 2 G. 2. Str. 817. *Ld. Raym.* 1550.]

(A 2.) By Matter of Writing.

So, a man may be estoppel by matter of writing, which is not of record: as, if a condition in a bond recites, *that there are divers suits in B. R.*, the obligor is estopped to say, that there are no suits there. R. Cro. El. 756. *Vide Estates*, (G 7.)

If a condition be, *to perform the covenants in an indenture*; he shall be estopped to say, that there is no such indenture. R. 1 Rol. 408. 1 Rol. 872. l. 30.

So, in all cases, where the condition of a bond has a reference to any particular thing, the obligor shall be estopped to say, that there is no such thing: as, if a condition be, *to pay all sums which T. is bound to pay to the children of B. according to the will of D.*; he shall be estopped to say, that T. is not bound to pay, &c. 1 Rol. 872. l. 50. Dy. 196. a.

[A party executing a deed is stopped by the recital of a particular fact in that deed to deny such fact. *Shelley v. Wright*, C. P. E. 10 Geo. 2. *Willes's Rep.* 9. *Coffens v. Coffens*, C. P. M. 11 Geo. 2. *Willes's Rep.* 25.]

[When a plaintiff replies that the defendant is estopped to plead his plea, he may demand judgment generally. *Ibid.*]

If a condition be, *to release all the right which he has in B. for his life*; he cannot say, that he had no right in B. for life. *Per Tanf.*, 1 Rol. 873. l. 5. *Vide infra* [et Cowp. 600.]

If a condition be, *to pay money for which he is bound in such a particular recognizance*; he cannot say, that there is no such recognizance. R. 1 Rol. 873. l. 10.

So, he cannot plead, that he was bound in such an one as appears to be no recognizance. R. 1 Rol. 873. l. 15.

If it be, *to give part of the goods which A. devised to him*; he cannot say, that A. did not devise. R. 1 Rol. 873. l. 20.

If a condition be, *that A. and his wife shall appear in B.*; he cannot say, that he has no wife. R. 1 Rol. 873. l. 25. *Al.* 13.

If a condition, reciting *that A. carried 1200 billets to D. be, that he shall pay so much a hundred*; he cannot say, that he did not carry 1200. R. *Al.* 52.



If a lease be by indenture; the lessee shall be estopped to say, *no demise*. 1 *Leo*. 156.

If a lease be by husband and wife; after the death of the husband the lessee shall be estopped to say, that the wife had nothing. *R.* 1 *Rol*. 872. l. 45.

So, a man may be estopped by any indenture or deed-poll. *Co. L.* 352. a.

By an acquittance or defeazance by indenture or deed-poll. *Co. L.* 352. a.

[So, in general the grantor is estopped by his deed, to say he had no interest. 2 *Term Rep.* 171.]

[But this principle does not apply, where the grantor is a trustee for the public, especially if deriving his authority under a public act of parliament he grant that which he is not empowered to grant by the act. 2 *Term Rep.* 171.]

If the condition of a bond contains a generality to be done, the party shall not be estopped to say, that there was not any such thing; as, if a condition of a bond be *to perform all agreements set down by A.*, the obligor may say, that no agreement was set down by *A.*, for the condition is general. *R.* 1 *Rol*. 872. l. 25.

If a condition be, *to carry away all the marl in such a close*; he may say, that there was no marl there. *R.* 1 *Rol*. 872. l. 35.

[A lessee by indenture is not estopped by the description of the lands in the lease; but may try the fact, whether the land called *L.*'s meadow, be meadow or not. *Skipwith v. Green*, *M.* 11 *G. Str.* 610.]

So, if it be, *to release all his right in B.*; he may say, that he has not any right there. *Per Tanf.* 1 *Rol*. 872. l. 37. *Vide supra* [et *Cowp.* 600.]

So, a deed-poll does not estop a lessee, grantee, &c. for it is the deed of the lessor, grantor, &c. only. *Co. L.* 363. b.

#### (A 3.) By Matter in Pais.

(A 3.) *By acceptance of an estate, &c.*] So, a man may be estopped by matter in *pais*, which is not in writing: as, if an husband, seized in right of his wife, enfeoffs *A.*, who afterwards demises to the husband and wife for life; tho' the wife be in her remitter, and *A.* has not any reversion, yet in waste against the husband and wife, the husband is estopped to shew such remitter, against his feoffment and acceptance of an estate from *A.*, tho' it was not in writing. *Lit. f.* 666, 667.

So, if a wife brings dower, and recovers, she shall be estopped afterwards to claim land settled upon her for her jointure.

Tho' she had entred clandestinely into the land settled for her jointure, before the writ of dower brought. 1 *Rol*. 862. l. 20. 25. 4 *Co.* 5.

So, a man may be estopped by acceptance of rent. *Co. L.* 352. a.

So, by entry, or livery, &c. *Co. L.* 352. a.

#### (B) Who are bound by an Estoppel.

**A**N estoppel is reciprocal, and binds both parties. *Co. L.* 352. a. (*Vide Cro. El.* 700.) *Vide* 1 *Term Rep.* 86.

All parties and privies are bound by an estoppel. *Pol.* 61. *Jon.* 460. So,

So, a privy in blood, as the heir, shall be bound by an estoppel, *Co. L. 352. a.*

As, if a contingent remainder be to *A.* in fee, who makes a lease by fine, or indenture, and then dies before the contingency happens; his heir shall be estopped by the lease. *R. Pol. 61. 66.*

If the eldest son of tenant in tail levies a fine, and then his father dies, and afterwards he dies without issue, his younger brother shall be estopped by the fine: for he must derive his title as heir to him. *Pol. 61.*

Tho' there was no interest at the time of the estoppel created, but the interest accrued afterwards to the ancestor. *R. Pol. 66.*

[But if the heir apparent of a *copyholder* in fee surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderor is not estopped by that surrender of his ancestor from claiming against the surrenderee. 3 *Term Rep. 365.*]

So, a privy in estate: as, if *A.* demises the manor of *D.* by indenture, for years, and afterwards purchases the manor, and sells it to *B.*; the vendee shall be bound by the estoppel to say, that *A.* had not any thing in the manor at the time of the lease. 1 *Sal. 276.*

So, if judgment be in a *scire facias* upon a judgment in *Trinity* term after *nul tiel record* pleaded, where in truth the judgment was in *Michaelmas* term; the party to the judgment, and all who claim under him, shall be bound by this estoppel. *R. 1 Sal. 276.*

So, a privy in law: as, the lord by escheat. *Co. L. 352. a.*

Every one, who claims under another by act of law, or in the *post. Co. L. 352. b.*

Tenant in dower, or, by the curtesy. *Pol. 61. Co. L. 352. a.*

So, where the title of the plaintiff is made by estoppel, the court and jury are bound by it: as, if the plaintiff in ejectment makes title by a judgment in a *scire facias* upon a judgment in *Trinity* term where it was in *Michaelmas* term; the jury cannot find that the original judgment was in *Michaelmas* term. *R. 1 Sal. 277.*

So, if a woman sues, or be sued, as *sole*, and judgment is against her as such, tho' she was *covert*; she shall be estopped, and the sheriff shall take advantage of the estoppel. 1 *Sal. 310. R. 1 Rol. 869. l. 50. Vide post. (D).*

If an executor or administrator admits assets, tho' he has them not; the sheriff may return a *devastavit*. *R. 1 Sal. 310.*

### (C) Who not.

**B**UT, generally a stranger shall not be bound by, nor take advantage of an estoppel. *Co. L. 352. a.*

So, a woman shall not be estopped, after coverture, by an admission upon record by her husband and her, during coverture.

As, if husband and wife admit *B.* to be a *mulier*; in another action by *B.* after the death of the husband, the wife may plead, that he is a bastard. 1 *Rol. 865. l. 10.*

If husband and wife plead a feoffment; the wife, after the death of her husband, may say, that nothing passed by the feoffment. 1 *Rol. 865. l. 5.*

If husband and wife make a lease, where the wife has nothing; after coverture, she shall not claim by estoppel. *Cro. El. 700. Vide post. (F).*

So,

So, an heir, who claims as heir of his father, shall not be estopped by an estoppel upon him as heir to his mother; as, if a woman, who had an estate for life, recovers in a *cui in vita* against the donee of her husband, supposing that she had a fee, and afterwards makes a feoffment, and dies, and the donee dies without issue the heir of the father shall recover against the feoffee of the mother, tho' heir also to her, and shall not be estopped by the record of the judgment in the *cui in vita*, which affirmed the mother to have a fee. *Co. L. 365. b.*

So, if a son be estopped by his pleading upon record, and dies, his uncle and heir shall be bound; but if he dies, and the land descends to the father, he shall not be bound by the estoppel of his son; for he cannot be heir to him. *Co. L. 12. a.*

So, if the heir does not claim the land from him who made the estoppel, but by his own purchase, or by another ancestor, he shall not be bound by the estoppel. *Jon. 460.*

Tho' he derives his blood from the party to the estoppel. *Jon. 460, 1.*

So, if the plaintiff does not rely upon the estoppel, the court and jury shall not be bound by it; but the jury may find the matter at large, and the court shall give judgment accordingly: as, in debt for rent upon a lease by indenture, if the defendant pleads *nil habuit in tenementis*, and the plaintiff replies, *quod habuit*. *1 Sal. 277. Vide Pleader, (S. 5.)*

[Defendant in trespass for *mesne profits* is not estopped by a judgment, in ejectment against the casual ejector, on which no writ of possession has issued, if he was not a defendant in the ejectment. *Jefferies v. Dyson, H. 7 G. 2. Str. 960.*]

[*A.* asserting that he had a right to a patent machine covenants with *B.* that *B.* shall have the liberty of using it in a particular manner; in consideration of which *B.* covenants that he will not use it in any other; in an action by *A.* on the covenant, *B.* is not estopped by the covenant from pleading in bar to the action, *that the invention was not new, or that the patentee was not the inventor*; but he may thus shew that the patent was void, and consequently that there was no consideration to him. *3 T. R. 438.*]

[But if the patentee himself assign the patent and afterwards infringe the right of the assignee, he is estopped from pleading to an action by the assignee, that the invention was not new. *Ibid.*]

#### (D) Who shall take advantage of an Estoppel.

EVERY one, who claims under an estoppel shall take advantage of the estoppel: as, a woman, who claims dower, shall take advantage of an estoppel by deed between her husband and his tenant: *1 Rol. 868. l. 47.*

If *A.* demises by indenture to *B.* for life, and afterwards by fine grants the reversion; the conusee shall estop *B.* in a *quid juris clamat*, to say that *A.* had nothing. *1 Rol. 868. l. 50.*

If a man recovers a rent-charge against *B.* out of his land, who afterwards sells the land to another; the vendee shall be estopped by the recovery, and the recoveror shall take advantage of it. *1 Rol. 868. l. ult.*

[The



[The purchaser of the reversion of lands demised; for the estoppel runs with the land. *Palmer v. Ekins*, M. 2 G. 2. Str. 817. *Ld. Raym.* 1550.]

So, an officer in the execution of process, shall take advantage of an estoppel upon record in the same action: as, if a *feme-covert* be sued as a *feme-sole*; the sheriff shall take her in execution, tho' she be the wife of another, and hath another name. R. 1 *Rol.* 869. l. 50. *Vide ante* (B).

If a man be sued as a knight and baronet, tho' he be not a baronet, and the sheriff takes him in execution; he shall not have an action against the sheriff. R. 1 *Rol.* 869. l. 45.

So, the king shall take advantage of an estoppel, tho' he be not party to the record; for he is always present in court. 2 *Inst.* 39.

So, every person shall take advantage of a disability, which appears by record; as, outlawry, excommunication, attainder, &c. tho' a stranger to the record. Co. L. 352. b. 128. b.

So, of bastardy, mulierty, certified, &c. Co. L. 352. b.

But a stranger shall not take advantage of the *misnomer* of any one upon record; for he is not bound by it. *Ibid.*]

So, a stranger shall not have advantage of *villinage* confessed, or found; but the lord only. Co. L. 128. b.

### (E) What shall not be an Estoppel.

(E 1.) A Record *coram non Judice*.

**B**UT a man shall not be estopped by a record, which was *coram non judice*: as, by record of an action in the Marshalsea, where neither party was of the king's household. 1 *Rol.* 863. l. 50.

Nor, by the record of a *formedon* sued in B. R. 1 *Rol.* 863. l. ult.

[The plaintiff in equity cannot be estopped by a verdict at law; for there is no such thing as an estoppel in a court of equity. *Pierce v. Jones*, P. 1717, in Sc. Bunb. 11.]

(E 2.) Where the Truth appears by the same Record.

So, a man shall not be estopped, where the truth appears by the same record. Co. L. 352. b. [*Vide Ludford v. Barber*, B. R. H. 26 Geo. 3. 1 T. R. 86.]

As, if a fine be levied, or concord made upon an original upon which a *retraxit* is entred; tho' the parties are estopped to say, when the fine is pleaded, that it was not upon an original, (for it shall be intended well levied, till reversed by error,) yet, if by the same record it appears that a *retraxit* was entred upon the original, then the parties are not estopped to say it; for it appears by the record itself. Co. L. 352. b.

[If defendant is sued by a wrong addition, and enters into bail-bond *prout* the writ, as he must, and then puts in bail above by his right addition, *who was arrested by the name and addition*, he is not estopped from pleading in abatement. *Barnes*, 94.]

If an impropriation be to a bishop of a rectory after the death of the incumbent; and by indenture, shewing that matter, the bishop demises the rectory for years in the life of the incumbent, and the lease is confirmed by the dean and chapter; the bishop is not estopped by the indenture of demise: for it appears by the same deed that he then had nothing in the rectory. Co. L. 352. b.

## (E 3.) Where the Thing is consistent with the Record.

So, a man shall not be estopped to aver a thing consistent with the record, writing, &c.: as, if *A. B. senior*, and *A. B. junior*, are bound by an obligation, that *the said A. B. shall not resort to such a woman*, &c. it may be averred, that *A. B. junior* was intended. *Semb. 3 Mod. 216.*

If a deed, release, &c. be inrolled upon record, the defendant may plead, that *nothing passed by the deed*, or, *not seised at the time*, &c.; for these pleas are consistent with the record. *1 Rol. 862. l. 35.*

So, if an obligor, being warned in *detinue* brought for the obligation itself, pleads *conditions not performed*; he may afterwards plead to debt against him upon the obligation, a special *non est factum*. *Semb. 1 Rol. 862. l. 45. 50.*

If a man purchases a charter for licence to alien his land; he may afterwards traverse the tenure of the king. *1 Rol. 864. l. 3.*

If *A.* demises two closes called *Lane's Meadows*, the lessee shall not be estopped to say, that they are arable, and not meadow. *R. 2 Mod. Ca. 312.*

[If a demise be made of premises in *Westminster*, late in the occupation of *A.*, particularly describing them, part of which was a yard, this will not pass a cellar situate under that yard which was then in the occupation of *B.*, another tenant of the lessor. And the lessor in an ejectment brought to recover the cellar is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised. *1 T. R. 701.*]

## (E 4.) Where the Allegation is uncertain.

So, an estoppel ought to be certain to every intent. *Co. L. 352. b. 303. a.*

And therefore, if a thing be not directly and precisely alleged, it shall not be an estoppel. *Co. L. 352. b.*

As, if a defendant pleads, *within age*, viz. *etatis 14 & non amplius*, and after judgment brings error within 7 years, and assigns error by attorney, he shall not be estopped to say that he was of full age at the time of the error assigned; for the allegation after the viz. that *fuit etatis 14 & non amplius*, is not positive. *R. 2 Jon. 170. (Vide Ray. 456.)*

So, if a man pleads a licence or pardon of alienation, he is not thereby estopped to say, that he does not hold *in capite* upon another alienation; for the licence says, *que tenentur de nobis in capite, ut dicitur*, and the plea is not more positive. *4 Inst. 111.*

So, if it be alleged by way of argument, or inference. *Co. L. 352. b. Pol. 396.*

So, if it be by way of recital. *Co. L. 352. b.*

## (E 5.) Or only a Supposal.

So, if a thing be alleged only as a supposal in a count, it shall not be an estoppel. *Co. L. 352. b. Vide ante, (A 1.)*

As, if in a *scire facias* upon a fine, the plaintiff makes himself heir by lineal descent, he may vary in his descent in a second *scire facias* if the first was mistaken. *1 Rol. 864. l. 27.*

## (E 6.) If it is not traversable, or material.

So, if the thing alleged be not traversable, or material, it shall not be an estoppel. *Co. L. 352. b.*

As,

As, in debt upon an obligation alleged to be made at *A.*; in another action upon the same obligation, he may say that it was made at *B.* 1 *Roll.* 864. l. 25.

If in error upon a judgment 20 *Car.* 2. it be assigned for error, that the defendant was within age, viz. *etatis* 14 *annorum*; tho' the error was assigned 26 *Car.* 2. and in both cases the defendant appears by attorney, the judgment shall be reversed; for the material part of the plea is, that he was within age, and the words after the viz. 14 *annorum* do not conclude him to be now within age. *R. Ray.* 456. (*Vide* 2 *Jon.* 170.)

So, if upon a distress for rent, the tenant prays in aid, alleging that he has a lease for ten years; he is not estopped afterwards to say, that he has a lease for 60 years; for in *aide prier* it is not material, for what term, if he be a lessee. *Ray.* 457.

In *rescous* upon a distress for rent, out of a house and one acre, the plaintiff shall not be estopped, because he at another time avowed for the same rent issuing out of a house and five acres. *Ibid.*

So, if *A.* claims by a deed to *B.* and *C.* and the heirs of their bodies, remainder to *D.*, and that upon the death of *C.*, without issue, *B.* aliened to *A.*, and *D.* entred, and issue is joined that at the entry of *D.* *C.* was alive, and this is found by verdict; after the death of *C.*, *D.* may plead that nothing passed by the deed, and shall not be estopped. *Ibid.*

(E 7.) So, an Estoppel may be avoided where an Act in *Pais* is done by him, who had not Power to do it.

So, acceptance of rent, &c. by him, who then had no title, shall not be an estoppel. *Co. L.* 352. b.

(E 8.) If an Interest passes, tho' not *pro tanto*.

So, if any interest passes from the party, there shall be no estoppel: as, if *A.* be tenant for life, remainder to *B.* in fee, and *A.* and *B.* join in a lease, if the lessee brings an ejectment upon the demise of both, in the life of *A.* he shall not recover; for it was only the demise of *A.*, and the indenture shall not be an estoppel to them; for an interest passed from both. *Co. L.* 45. a.

If lessee for the life of *B.* leases for 21 years, and afterwards purchases the fee, and *B.* dies; he shall void his lease for years, tho' it was by indenture; because an interest passed by his lease for the life of *B.* *Co. L.* 47. b. *Mo.* 20.

If *A.* demises to *B.* the herbage of his own land by indenture; *B.* is not estopped to say, that *A.* had nothing in the land: because the lease was not of the land. *Co. L.* 47. b.

(E 9.) If there be an Estoppel against an Estoppel.

So, an estoppel against an estoppel sets the matter at large: as, if *A.* claims common by grant, and, in another action against the same defendant, claims it by prescription, and the defendant admits it; *A.* who was estopped by his former claim to allege prescription, by the admission of the defendant shall be now at liberty to do it. 1 *Roll.* 874. l. 50.

So, if a defendant pleads joint-tenancy with *B.*, and the plaintiff traverses that he is sole tenant; the defendant may vouch as sole tenant: for the plaintiff is estopped to gainsay it. 1 *Roll.* 875. l. 5.



## (E 10.) If the Truth be found by Verdict.

So, if the jury find the truth of the fact, the court will give judgment accordingly, without regard to the estoppel. *Vide ante* (C).—*Pleader*, (S 5.)

And therefore, if a lease be by indenture by *A.* to *B.*, and afterwards *B.* brings an ejectment for lands demised against *A.*, and upon *not guilty* the jury find that *A.*, having nothing in the land, demised to *B.* by indenture *prout*; there shall not be judgment for *B.* *Dub. Sav.* 99.

If by confession in a court of record, by livery sued, &c. tenant in tail be estopped to say that he does not hold of the king; upon a *diem clausit extremum* the jury shall find the truth, and thereby the heir shall be relieved. 1 *H.* 4. 5. *b.*

But where an estoppel binds the estate, and converts it to an interest, the court will adjudge accordingly; as, if *A.* leases land to *B.* for six years, in which he has nothing, and then purchases a lease of the same land for 21 years, and afterwards leases to *C.* for 10 years, and all this is found by verdict; the court will adjudge the lease to *B.* good, tho' it was so only by conclusion.

So, if *A.* leases for years, having only a contingent remainder not vested, and after the contingency levies a fine to *B.* in fee, and the whole is found by verdict; the lease for years shall be adjudged good. *R. Pol.* 68.

So, if *A.* be disseised, and during the *disseisin* a common recovery is had against him as tenant, to the use of *B.*, tho' the recovery was void for want of a good tenant to the *præcipe*, it shall be good by estoppel against *A.* his heirs and assigns. *R. upon a special verdict*, 1 *Roll.* 865. *l.* 15. *Cro. Car.* 389. 1 *Roll.* 868. *l.* 35.

## (F) When an Estoppel determines.

SO, an estoppel determines by *cesser* of the act, deed, &c. which made the estoppel; as, if a man takes a lease for years by indenture of his own land; if the lease determines, it shall be a determination of the estoppel. *Co. L.* 47. *b.*

[If tenant for life makes lease for years by indenture, during his life and the continuance of the lease, the tenant is estopped to say he has not the reversion in him; but he being dead, he is not estopped, but may confess the lease, and avoid it on covenant by the heir, for nor repairing. *R. on demurrer, Brudenell v. Roberts*, T. 2 G. 3. 2 *Wilf.* 143.]

If *A.* accepts a lease from *B.* and his wife, where the wife has nothing; after the death of the husband, the estoppel ceases, and *that she had nothing* may be pleaded in bar of an action by the wife. *R. Cro. El.* 700. *Vide ante* (C).

## ESTRAY.

*Vide Waife* (F).

## ESTREAT.

*Vide Prærogative*, (D 57. 59.)

## STREPEMENT.

*Vide Waste*, (B 2.)

## EVESQUE.

*Vide Certificate*, (A 1, &c.) — *Ecclesiastical Persons*, (C 2.) — *Esglise*, (H 11. 13.) — *Ireland* (E). — *Pleader*, (3 I 9. 12.) — *Visitor*, (A 8.)

## EVIDENCE.

## (A 1.) What Things are allowed for Evidence ; Matters of Record.

**E**VIDENCE imports matters of record ; as, letters patent, fines, recoveries, &c. writings under, or without seal ; as, charters, deeds, court-rolls, accounts, &c. testimony of witnesses, and other proof given to a jury. *Co. L.* 282. a.

And therefore letters patent may be produced in evidence.

[A commission of inquiry under the Exchequer-seal, and an inquisition taken thereon, is admissible, but not conclusive evidence of lands having been part of a priory, tho' party to the suit was no party under this commission. *Tooker v. D. Beaufort*, H. 30 G. 2. 1 B. M. 146.]

A fine, or common recovery.

A judgment, statute, recognizance, or other matter of record.

So, a judgment and recovery in *Wales*, in a *quod ei deforceat*. *R. Hard.* 118.

Letters patent of land in a county-palatine under the seal of the duchy. 4 *Inst.* 209.

So, the pope's bull. *Vide post.* (A 2.)

So, by the *st.* 29 *Car.* 2. 8. a grant of augmentation to a vicarage, registred, examined, and attested by the bishop, &c. is a record.

[No record of a criminal conviction can be given in evidence in a civil suit, for it might have been on the evidence of a party interested in the civil suit. *Gibson v. M'Carty*, T. 9 G. 2. B. R. H. 311.]

[Therefore if *A.*, convicted of forging a note from *B.* to himself, sues for other notes from *B.* to his intestate, and reads a deposition of a dead witness to prove *B.*'s owning the notes in question, and the same witness has sworn to *B.*'s owning the forged note, yet the record of conviction for forgery cannot be read, but the forged note may, and the marks of forgery shewn. *Ibid.*]

## (A 2.) What shall be sufficient Proof.

(A 2.) *The record, or exemplification.*] If the record itself be produced, it shall be read without other proof.

So, letters patent under the great seal shall be read without other proof.

So, by the *st.* 3 (or 3 & 4) *Ed.* 6. 4. and 13 *El.* 6. patentees, and all claiming under them, may make title, &c. by shewing the exemplification, or *constat* of the roll.

And

And these statutes extend to all the king's patents which concern land, privilege, or other thing, granted to a subject, corporation, or any other. *R. 5 Co. 53.*

So, the chirograph of a fine is sufficient, without other proof. *Pl. Com. 409. b.*

Or, the exemplification of a fine.

So, the exemplification of a common recovery under seal is sufficient, without more.

So, an exemplification of a recovery in an inferior court of record under the town-seal, where the records are consumed. *Hard. 120. per Hale. 1 Mod. 117.*

So, an exemplification of a recovery in *antient demesne*, being old, if the records are lost. *R. 1 Mod. 117.*

And by the *st. 27 El. 9.* the exemplification of a recovery in *Wales*, or a county-palatine, shall be of the same validity to all intents as the original record.

So, an exemplification of any record under the great seal, or seal of the court, is sufficient. *10 Co. 93. a.*

So, an exemplification of a record in *Wales* or a county-palatine, under the seal of the court there. *Semb. Hard. 120.*

So, an exemplification of the pope's bull, under the seal of the bishop, shall be allowed. *R. Hard. 118.*

[Exemplification under the archbishop's seal of administration, with the will annexed, is a good evidence, tho' it only recites the fact, and sets out the will *in hac verba*. *Kempton v. Croft, P. 8 G. 2. B.R.H. 108.*]

[The journals of the House of Lords are admissible even in criminal cases. *Ibid.*]

[So, sworn copies of certain entries in the journals of the House of Commons were produced and read as evidence, on the part of the crown, in a trial for high treason, and not objected to. *Rex v. Gordon, H. 21 Geo. 3. Dougl. 593.*]

[The certificate of the auditor of the duchy of *Lancaster* is sufficient evidence of the enrolment of a duchy-lease. *Doug. 56.*]

[So, the indorsement by the proper officer is sufficient evidence of the enrolment of a *bargain and sale*. *Id.*]

[The mere production in a court of a diploma of doctor of physic, under the seal of one of the universities, is not in itself evidence to shew that the party named in the diploma is entitled to that degree, *Moses v. Thornton, B.R. T. 39 Geo. 3. 8 T.R. 303.*]

(A 3.) *A copy, or witnesses, &c.* So, a record may be proved by a copy examined with the original; for a rasure or interlineation shall not be presumed. *10 Co. 92. b. 2 Rol. 678. l. 45.*

[The printed statutes examined with the parliament-roll. *Rex v. Jefferies, T. 7 G. Str. 446.*]

[In an action on a *wager* whether a decree of the court of *Chancery* would be reversed on appeal to the House of Lords, a copy of the reversal is sufficient evidence, *without* producing the *minute-book* itself; such copy need not be on stamps. *Cowp. 17.*]

[Wherever an original is of a *public nature*, and would be evidence if produced, an immediate sworn copy thereof will be evidence. *3 Salk. 154.*]



[A marriage-register is in the nature of a record, and need not be produced nor proved by subscribing witnesses; but a copy is sufficient in an action for *crim. con.* to prove a marriage in fact. *Birt v. Barlow*, B. R. E. 19 Geo. 3. Dougl. 171.]

Tho' it be a record in *Wales*, &c. it may be proved by an examined copy. *R. Hard.* 119.

So, a copy of a common recovery is sufficient, without proving a tenant to the *præcipe*; for it shall be intended well suffered, if the contrary does not appear. 2 Cro. 455. *Lut.* 1549. 1 *Mod.* 117.

Tho' it be a recovery of a reversion, if it be ancient, and the possession accordingly; for a surrender shall be intended. 1 *Vent.* 257.

[The copy of a copyholder's admittance of 30 years standing, is evidence, tho' not signed by the steward. *Dean of Ely v. Stewart*, T. 1740, 2 *Atkyns*, 44.]

[A customary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from steward to steward, altho' not signed by any person, is good evidence to prove the course of descent within the manor. 1 *Term Rep.* 466.]

So, if a record be lost or consumed by fire, it may be proved by collateral evidence; as, in ejectment for a rectory to which a recusant presented, the record of conviction being burnt, may be proved by the estreats in the *Exchequer*. *R. Hard.* 323. 1 *Sal.* 285.

So, if *appropriation* or *not* be the issue, the king's licence being lost, may be proved by other evidence; for it is not directly the point in issue. *R. Hard.* 323.

So, in *trover*, if a *feri facias*, or *venditioni exponas*, &c. be lost. *R. Hard.* 323. *Al.* 18.

So, a recovery in *ancient demesne* being lost, and the roll not found, may be proved by witnesses, where the possession has gone accordingly. 1 *Vent.* 257. [2 *Str.* 1129. 2 *Burr.* 1072. 4 *T. R.* 514.]

[A copy of an award, the original being lost in a mail robbed. *Robinson v. Davis*, T. 8 G. Str. 526.]

[If an original note is lost, and a copy offered in evidence, the court must first be satisfied of the genuineness of the original. *Goodier v. Lake*, M. 1737, 1 *Atkyns*, 446.]

So, a record may be explained by witnesses; as, what manor, person, &c. was intended, where there are several of the same name. *Pl. Com.* 85. b.

[A witness may refresh his memory by any book or papers, if he can afterwards swear to the fact from his own recollection. But if he cannot swear to the fact from recollection any farther than as finding it entred in a book or paper, the original paper or book must be produced. *Doe v. Perkins*, B. R. T. 30 Geo. 3. 3 *T. R.* 749.]

[An officer may be examined as to the condition, but not as to the matter of a record. *Leighton v. Leighton*, M. 6 G. Str. 210.]

[If the patron's name in an institution is left blank in the bishop's register, parol evidence may be admitted to prove who was patron. *R. on error from Ireland, Bp. Meath v. Ld. Belfield*, P. 21 G. 2. 1 *Wils.* 215.]

[If two are indicted and acquitted, and copy of indictment granted to one only, the other may read it in evidence in action for malicious prosecution. *Jordan v. Lewis*, M. 13 G. 2. Str. 1122.]

[If the acts of condemnation of a ship in admiralty-court abroad,

are

are lost at sea, parol evidence shall not be allowed of the reasons of condemnation, what was lost being only copy of evidence. *Blidstyn v. Sedgwick*, T. 9 G. 2. B. R. H. 304.]

[General declarations of a parent are good evidence, after the death of such parent, to prove that a child was born before marriage; but not to prove that a child born in wedlock is a bastard. *Goodright v. Moss*, B. R. E. 17 Geo. 3. Cowp. 591.]

[Tradition is sufficient in point of pedigree. By Ld. Mansfield Ch. J. *Ibid.* 594.]

[So, an inscription on a tomb-stone. *Ibid.*]

[So, a pedigree hung up in the family-mansion. *Ibid.*]

[So, an entry in a father's family-bible to prove the birth of a child. *Ibid.*]

[So, circumstances may be proved to shew the illegitimacy of a child; as, that from its birth to the death of its parents it was treated as illegitimate, and another introduced and considered as the heir of the family. *Ibid.*]

[Declarations by tenants are admissible evidence after their death to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. *Davies v. Pierce*, B. R. T. 27 Geo. 3. 2 T. R. 53.]

[Whether evidence of declarations of a pauper dead or insane, relative to his settlement, be admissible? *Qu. Rex v. Eriswell*, T. 30 Geo. 3. 3 T. R. 707.]

#### (A 4.) What Proof is not sufficient.

But, regularly, a record is of so high a nature, that it cannot be proved but by the record itself, or an exemplification, or copy thereof. 10 Co. 92. b.

So, the whole record, which concerns the matter in question, ought to be produced.

So, evidence to prove a record, which is lost or consumed, ought to be full and cogent. *Hard.* 324.

And therefore, a warrant for a *diem clausit extremum*, and an entry in the docket-book, is not sufficient proof of such writ. *Hard.* 120.

So, an estreat in the *Exchequer*, and an inquisition upon it, is no proof of a conviction, where the estreat supposes it at the same assises at which the presentment of recusancy was made; for by the *st.* 23 *El.* 1. and 29 *El.* 6. proclamation shall be at the assises, when indicted, to render himself before the next assises, and therefore he cannot be convicted at the same assises. *R. Hard.* 323.

So, if a recovery of a reversion was suffered but 10 or 12 years past, a surrender to make a tenant to the *præcipe* ought to be proved.

So, if there be probable evidence of an estate for life *in esse* in another; as, a lease, or mortgage by him. *R. 5 Mod.* 211.

#### (A 5.) A Verdict, Nonsuit, &c.

(A 5.) *When it shall be allowed.*] So, a verdict in another action for the same cause shall be allowed in evidence between the same parties.

Tho' judgment was afterwards arrested for want of form. 2 *Rol.* 46.

So, it shall be evidence, where the verdict was for one under whom any of the present parties claim.

So, a verdict for or against a lessee shall be evidence for or against him in reversion. *Per Holt, 6 Ann. Hard. 472.*

So, a verdict for him in remainder shall be evidence for a subsequent remainder-man in the same deed; for tho' he does not claim under him for whom the verdict was, yet he claims by the same deed. *R. 8 W. 3. B. R. (1 Ld. Raym. 730.)*

[A recovery in ejectment against the wife cannot be given in evidence in an action against the husband and wife for mesne profits. *Denn v. White, B. R. H. 37 Geo. 3. 7 T. R. 112.*]

So, a verdict for or against a plaintiff, with proof of the evidence by him given, shall be evidence in an action by another against him for the same thing; as, in an action by a common carrier for goods delivered by mistake, a verdict for or against the plaintiff, with the proof by him given, shall be evidence in an action by the owner against the carrier for the same goods. *Per Holt, at Guildhall, 14 W. 3.*

So, a nonsuit, with proof of evidence then given, shall be allowed as evidence against him in another action by the same plaintiff. *R. 5 Ann. in C. B.*

So, if the jury are agreed, and afterwards discharged before the verdict given and recorded, it shall be allowed for evidence, that the jury were agreed, in the case of a common person. *R. 2 Rol. 680. l. 5.*

[An inquisition *post mortem*, traversed, and trial thereon, tho' voidable, is evidence. *Leighton v. Leighton, P. 6 G. Str. 308.*]

[A special verdict, to which defendant was no party, given in a cause in which the premises in question were recovered on a general verdict, and the special verdict related to other premises, shall not be allowed as evidence even of a pedigree. *Neal v. Wilding, P. 14 G. 2. Str. 1151.*]

[Whether the coroner's inquest might be read as evidence against the executrix, to whose advantage it was, *dubitat*. *Parker C. J. and Pospys J. pro Eyre J. and Pratt J. cont. Jones v. White, M. 4 G. Str. 68.*]

(A 6.) *What shall be sufficient proof.*] If a verdict be offered in evidence, it ought to be proved by an exemplification of the verdict, and judgment upon it. (*Vide Hard. 118, &c.*)

[The *possea* is no evidence of the verdict, without a copy of the final judgment; for judgment might have been arrested, or a new trial granted. *Pitton v. Walter, H. 5 G. Str. 162.*]

[The *Nisi Prius* record, and the *possea*, are evidence to prove that the cause was tried, but not to prove that a verdict was given. *Fisber v. Kitchingman, C. P. M. 16 Geo. 2. Willes, 367. Barnes, 449. S. C.*]

[But in an action on a *wager* whether a decree of the court of Chancery would be reversed on appeal to the House of Lords, it is not necessary, on the trial, to shew the previous proceedings; proof of the decree, and of its being reversed, is sufficient. *Cowp. 17.*]



## (B 1.) A Charter or Deed, under Seal.

SO, any charter, or deed under seal of the party, shall be allowed for evidence.

So, a deed inrolled by consent of one party only, shall be evidence against him, and all who claim under him. 3 *Lev.* 388.

So, a deed which begins, *this indenture*, shall be evidence tho' it be not an indenture. *Per Hale*, at *Norfolk assises* 1668.

So, a deed shall be evidence, tho' by accident, &c. the seal be broken, or torn off. *Pal.* 403. 1 *Mod.* 211. *Per B. R.* 12 *W.* 3. *inter Sir M. Dayrel and Glascock.*

Tho' cancelled by practice. (*Vide* 1 *Vent.* 297.)

So, a counterpart, where it is proved that there was an original, and that cannot be had. (*Vide* 1 *Sal.* 287.)

[A deed is good evidence, if stamped when produced at the trial, tho' not stamped when executed, or when first produced. *Rex v. Bishop of Chester*, P. 11 G. Str. 624.]

[But annexing another piece of parchment with a stamp upon it, will not do; the stamp must be on the parchment itself (and to obtain this the penalty must be paid). *Rex v. Reeks*, M. 13 G. Str. 716. *Ld. Raym.* 1445.]

[A bond, in the condition whereof a mortgage-demise is contained, need not have two stamps. *Barnes*, 463.]

## (B 2.) When allowed, without Proof.

An ancient deed dated forty years past shall be read, without other proof.

[So, if above thirty years, it proves itself. 2 *T. R.* 471.]

So, a deed, indorsed, as inrolled, shall be read, without proof. *R. P.* 6 *W. & M.* in *B. R.* 1 *Sal.* 281.

Tho' there was no need of an inrolment to make such deed effectual. 1 *Vent.* 296. 3 *Lev.* 388. 1 *Sal.* 280.

So, the counterpart of a deed to declare the uses of a fine. *Mod. Ca.* 225. 1 *Sal.* 287.

[Where the plaintiff produces the original lease of a long term, and proves possession for the last seventy years, all mesne assignments shall be presumed. 2 *Bl. Rep.* 1228.]

[A deed coming out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and will be received in evidence, without proof of the execution. 2 *Term Rep.* 41.]

## (B 3.) When Proof is necessary.

But, regularly, a deed shall not be given in evidence, without proof of the execution. 10 *Co.* 93. a.

Proof of the execution ought to be by one of the witnesses at least.

Or, if it be proved that they are all dead, or upon strict inquiry cannot be discovered to be alive, by proof that the name of any one indorsed is the writing of the same person. *Per Holt*, 5 *Ann.*

[If attesting witness has lived abroad, strict proof of his death is necessary; if he has lived in *England*, slight proof is sufficient. *Henry v. Philips*, T. 1740, 2 *Atkyns*, 48.]

[If a subscribing witness is become infamous, on producing his conviction, his hand may be proved as if he was dead. *Jones v. Mason*, P. 2 G. 2. Str. 833.]

Or, that the name of the party, who executed it, is his proper hand-writing.

[In debt on bond by the administrator *de bonis non* of the obligee, and who was the only surviving witness to the bond, proof of the hand-writing, and several letters from the obligor mentioning the bond, allowed good. *Godfrey v. Norris*, H. 3 G. Str. 34.]

Or, by any one present at the execution of the deed, tho' he be not indorsed as a witness.

[Where three obligors, and action brought against one only, the other obligor allowed to be a witness to prove execution of bond by defendant. *Lockhart v. Graham*, H. 3 G. Str. 35.]

[In debt on a bond, proof that the defendant admitted the debt, and that the attendance of the subscribing witness could not be procured, together with proof of the hand-writing of the defendant and of the witness, is sufficient. *Doug.* 93.]

[But the acknowledgment of the obligor that he owed the debt for which the bond was given, does not supersede the necessity of calling or accounting for the absence of the *subscribing witness*, whether in an action against the obligor himself, or in an action by his assignees after his bankruptcy, where the petitioning creditor's debt arose on the bond in question. *Doug.* 216.]

[*A.* grants an annuity for his own life to *B.*, to secure which a bond and warrant are given, and judgment entred. *B.* dies. After his death the court will not admit evidence of a parol agreement between the parties that *A.* should be at liberty to redeem the annuity on certain terms, (especially if it be the evidence of the attorney concerned,) as a ground to order the securities to be given up, and satisfaction entred on the judgment. *Haynes v. Hare*, C. P. T. 31 Geo. 3. 1 H. Bl. 659.]

#### (B 4.) When the Deed itself.

So, regularly, the deed itself ought to be produced, whereby it may appear to the court that it is not razed or interlined. 10 Co. 92. b.

And therefore, generally, a copy of a deed shall not be allowed for evidence, tho' examined and attested. *Ibid.*

Tho' wrote by counsel as a true copy, and delivered to the party as such. 1 Mod. 94.

So, proof of the contents by witnesses shall not be allowed. 10 Co. 92. b.

Nor, a counterpart, without circumstances which induce credit that there was an original. R. 1 Sal. 287.

But a counterpart has been allowed, where the original cannot be found, and there is probable proof that there was an original; as, a counterpart of a lease, where the lessor himself acknowledged that he made a lease, of which this was a counterpart. *Per C. B.* 6 Ann. inter *A. and Whitcomb.*

So, a counterpart of a lease, found by the heir of the lessor among the writings of the ancestor. 1 Lev. 25.

Tho' no witness be indorsed. *Ibid.*

So,

So, if it be proved that the original was assigned to the defendant or another under whom he claims. *Per Tracy, 6 Ann.*

Or, that the original is destroyed or lost. *R. Mod. Ca. 225.*

So, if a deed be destroyed or lost, a copy may be allowed. *10 Co. 92. b.*

Tho' not examined; if it was written for a true copy. *1 Mod. 4.*

So, proof of the contents by witnesses may be allowed in such case. *10 Co. 92. b.*

So, a copy, or proof of the contents has been allowed when a deed was embezzled, or detained by the other party. *1 Keb. 12. 3 Keb. 2.*

[To establish a settlement by apprenticeship, it was proved that the indenture was of two parts; that one had been destroyed, that the other had come to the hands of *A. B.* who, upon being asked for it, said that she could not find it; but *A. B.* was not subpoenaed, and upon that ground the evidence was deemed insufficient. *Rex v. Castleton, E. 35 Geo. 3. 6 T. R. 236.*]

[If a person execute a bill of sale of goods without stamp, such an instrument cannot be received in evidence, and yet the vendee cannot resort to any parol evidence of the agreement. By Lord Kenyon Ch. J. *Rolleston v. Hibbert, B. R. M. 30 Geo. 3. 3 T. R. 413. Vide infra.*]

[Defendant in ejectment refusing to produce the lease in her custody, an attorney who had read it was allowed to give evidence of the contents. *Young v. Holmes, M. 4 G. Str. 70.*]

[Tho' a party be not bound to produce evidence against himself, yet even in a criminal prosecution notice may be given to him to produce papers in his possession; and in case of his refusal or neglect, other evidence may be given of their contents. *2 T. R. 201. n.*]

[And notice to the defendant's agent or attorney in such case is sufficient. *Ibid.*]

#### (B 5.) A Recital, when Evidence.

So, a recital in a deed may be evidence, against him who executed, or claims under the party, who by such recital is estopped; as, the date shall be evidence that it was executed the same day. *Per Holt. (Vide 1 Sal. 286.)*

A recital of a jointure to *A.* that there was a jointure to her. *Per Tracy, 7 Ann.*

So, a recital of a deed is evidence of it, where the deed recited is lost. *R. Mod. Ca. 45.*

So, a recital of a lease for a year in a release shall be proof that there was such lease, if possession has been accordingly for several years. *Per Gould, 12 W. 3. at Hertford. R. 2 Ann. 1 Sal. 286. Mod. Ca. 44.*

But a recital, generally, is no proof of the deed recited; as, if a patent or lease be recited, the patent or lease ought to be proved. *R. Hard. 120. Semb. Vau. 74. R. 2 Lev. 158.*

So, if a patent be recited to be surrendered, and the patent be proved by one party as *in esse*, the other ought to prove the surrender. *2 Rol. 678. l. 40. R. 2 Vent. 171.*

Yet if the one relies upon the recital as proof of the patent, it shall be also proof of the surrender. *R. 2 Vent. 171.*

So,



So, a recital of a *levari* or other record, in a record, is no proof of the *levari*, &c. *Per Hale*, 23 Car. 2. *Sir P. Pindar*; if the record of the *levari* is not lost.

So, a recital of a lease in a release, is no proof against a stranger, without shewing that the lease is lost. *R. 1 Sal.* 286.

Nor, a recital of a deed for the uses of a fine, without proof that there was a deed of uses. *Mod. Ca.* 45.

[An averment in a declaration on the *stat. 8 Ann. c. 9.* against the master of an apprentice for not inserting the true consideration in the indenture; "that *A. B.* the apprentice, by a certain indenture executed "on, &c. put himself apprentice to the defendant," &c. may be proved by the production of that part of the indenture executed by the defendant, in which it is recited that *A. B.* put himself apprentice, &c. *Burleigh v. Stibbs*, *B. R. M.* 34 Geo. 3. 5 *T. R.* 465.]

### (C 1.) Writings without Seal.

[Corporation-books, when publicly kept as such, and the entries made by the proper officer. *Rex v. Motherfell*, *E.* 4 G. Str. 93.]

[Copies of corporation-books, or of a poll, are evidence; and in that case *B. R.* will not order the original to be produced, without particular reason. *Brocas v. Mayor and Aldermen of London*, *P.* 6 G. Str. 307. *Mead v. Robinson*, *C. P. T.* 16 & 17 Geo. 2. *Willes*, 422.]

[A visitation made by the heralds, entred in their books, and kept in their office, evidence of a pedigree. *Pitton v. Walter*, *H.* 5 G. Str. 162.]

[So, the minute-book of a former visitation, signed by the heads of the several families, and found in a private library. (*Ld. Oxford's.*) *Ibid.*]

[The copy of an old agreement, where the original is in the *Bodleian*, whence the *Oxford* statutes prohibit it to go out. *Downes v. Mooreman*, *H.* 1724, *Bunb.* 189.]

[A survey of a religious house, (in the first-fruits' office,) tho' the commission is lost. *V. of Killington v. Trin. College*, *T.* 21 Geo. 2. 1 *Wilf.* 170.]

[A gazette is evidence of all acts of state; and therefore a gazette, in which it was stated that certain addresses had been presented to the king from different bodies of his subjects, expressing their loyalty, &c. was admitted in evidence to prove an averment in an information for a libel, "that divers addresses, &c. had been presented to his "majesty by divers of his subjects," &c. *Rex v. Holt*, *B. R. M.* 34 G. 3. 5 *T. R.* 436.]

[If there is a general register-book of a parish, into which the entries of baptisms are made every three months, from a day-book into which they are made immediately, the first is the register and evidence, and the day-book not, tho' they differ, or any thing omitted in the register which appears in the day-book; as, *B. B.* to signify base born. *Per Probyn and Lee J. contra Page J.* *May v. May*, *P.* 10 G. 2. Str. 1073.]

[Certificate of the commissioners, for stating the army-debts, conclusive. *Moody v. Thurston*, *M.* 8 G. Str. 481.]

[But it must be signed by them sitting upon the commission. *Mountcan v. Wilson*, *T.* 9 G. Str. 558.]

[An affidavit of the deceased allowed to be read, in confirmation of other evidence, to prove his marriage at the *Fleet*, tho' taken before a surrogate, when nothing before ecclesiastical court. *Sacheverell v. Sacheverell*, March 1716, *Court of Delegates*, *Str.* 35.]

[A writing without stamps, (being an agreement, "that *A.* and "partners shall work mines in *B.*'s ground, and *B.* to have a proportion, and to be also partner for an eighth,") which is not a lease nor an assignment, may be given in evidence on trespass brought by *A.* against a stranger. *Harker v. Birkbeck*, *T.* 4 *G.* 3. 3 *B. M.* 1556.]

[A letter 50 years old, found in the corporation chest, is not a corporate act, so as that a copy of it may be evidence, but the original must be produced. *Rex v. Gwyn*, *M.* 7 *G.* *Str.* 401.]

[An entry in an attorney's debt-book may be read after his death, to prove that a deed was made. *Warren v. Grenville*, *P.* 13 *G.* 2. *Str.* 1128.]

[Entry in a bankrupt's books, before the act of bankruptcy, is evidence. *Per Willes C. J.* *T.* 10 & 11 *G.* 2. *B. R. H.* 378.]

[Indorsement on a bond, of interest paid within 20 years, is evidence, tho' under the hand of the obligee, if it was made before it could be thought necessary to encounter the presumption. *Searle v. Ld. Barrington*, *H.* 2 *G.* 2. affirmed in the Exchequer-Chamber, and in Parliament, *Str.* 826. 2 *Ld. Raym.* 1370.]

[But if the indorsement is after the presumption has taken place, it is not evidence. *Turner v. Crisp*, 13 *G.* 2. *Str.* 827.]

[Bill of parcels from a merchant abroad, with his receipt to it proved, is evidence of property on an action on policy of insurance. *Ruffel v. Boheme*, *H.* 13 *G.* 2. *Str.* 1127.]

[A survey taken by one under whom the party who produces it claims, cannot be given in evidence, the other party not being privy. *Str.* 95.]

[The customs of one manor allowed as good evidence of the customs of another manor, in the three northern counties, because antiently they made one earldom. *D. Somerset v. France*, *M.* 12 *G.* 1. *Fort.* 41. *Lowther v. Raw*, in the House of Lords, 1735, *Fort.* 44.]

[*N. B.* The judges of *C. B.* and barons of *Exchequer* declared afterwards, that the customs of other manors ought not to have been admitted as evidence. *D. Somerset v. France*, *M.* 12 *G.* *Str.* 654. *Vide acc. Doug.* 495.]

[The custom of one manor has been given in evidence to shew the custom of another, where they are both governed by the border-law. *Per Ld. Kenyon C. J.* *Roe v. Parker*, *B. R. M.* 33 *Geo.* 3. 5 *T. R.* 31.]

[An entry in the court-rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of descent, tho' no instances are adduced of any persons having taken according to it. *Ibid.*]

[A terrier or court-roll is good evidence. *Ibid.*]

[Entries written by a steward of a former owner from whom title is derived are, if the steward is dead, admissible evidence where the right to the soil is in issue. *Barry v. Bebbington*, *B. R. H.* 32 *Geo.* 3. 4 *T. R.* 514.]

[An entry, of the receipt of money by officers of a township from the

the officers of another township, of a proportion of church-rates made in a parish-book, is evidence to charge the latter officers with the same proportion in future. And another entry explaining the proportions, made on the same page, is also admissible evidence. *Stead v. Heaton*, B. R. E. 32 Geo. 3. 4 T. R. 669.]

[Entries, made by a third person deceased, in the books of receipts of rent from his tenant for a particular estate, are not evidence to prove the identity of the land in a cause between two others. *Outram v. Morewood*, B. R. H. 33 Geo. 3. 5 T. R. 121.]

[The plaintiff's agent shewed to the defendant, an underwriter, the captain's protest, containing an account of the loss of the ship insured, demanding payment; and it was holden, that this did not entitle the defendant to read the protest in evidence in an action on the policy. *Senat v. Porter*, B. R. H. 37 Geo. 3. 7 T. R. 158.]

[The custom of archdeaconries in the same diocese, is not evidence of a custom in another. *Str.* 957.]

[On a question on the custom of tything in the parish of *A.*, evidence that such a custom exists in the adjacent parishes, is not admissible. If the custom be laid as the general custom of the whole county, it is. *Cowp.* 807.]

[But to prove the manner of conducting a particular branch of trade at one place, evidence may be given of the manner of conducting the same branch at another place. *Doug.* 495.]

[*A.* is possessed of part of the waste by consent of lord and tenants, no grant or lease appears, but many instances in like cases of leases, none of grants in fee; *A.* pays rent of 10*s.* On his death (leaving nephew who enters on his real estate) his widow and administratrix comes into possession of the premises, and pays the rent; by will directs the premises to be sold by her executor; he pays rent, mortgages the premises in fee, then releases the equity of redemption in fee, and levies a fine. Then appears a draught of a lease of the premises from the lord to *A.* for 41 years, among the lord's papers, and a copy of it among *A.*'s papers. This is no evidence of a grant in fee to *A.* on trial by grand assise on writ of right patent. *Tyssen v. Clarke*, P. 13 G. 3. 3 Wils. 419. P. 14 G. 3. 3 Wils. 541. 558.]

(C 2.) When Liberty of Inspection, &c. shall be granted.

[A plaintiff shall be obliged to produce his books relative to his dealings with defendant. *Gonter v. Nunnely*, P. 13 G. 2. *Str.* 1130.]

[On an issue to try a *modus*, the plaintiff may be ordered to produce the books of former rectors, if they have been produced at the hearing. *Bennet v. Treppas*, H. 1723, *Bunb.* 143.]

[Plaintiff in trespass for distress for a fine set by the lieutenancy of London, shall have leave to inspect their books and take copies, but the commissioners shall not attend with the books. *Edwards v. Vesey*, T. 8 G. 2. B. R. H. 128.]

[If there is a rule *nisi* for information *quo warranto*, the court will make rule for defendant to inspect charter and corporation-books. *Rex v. Hollister*, P. 9 G. 2. B. R. H. 245.]

[An elector, officer in post-office, sued on 9 *Ann.* has a right to inspect corporation-books where the freemen's names are inrolled, and to take copies. *Barnes*, 235.]

[Defendant,



[Defendant, holder of stakes at a horse-race, shall give plaintiff copy of the racing articles. *Barnes*, 439.]

[The court will order a justice of peace to give copy of information, and to produce the original, (at trial for false imprisonment against informer,) and constable to produce warrant. *Barnes*, 468.]

[Every member of a corporation has a right to look into the books of the corporation for a matter that concerns himself, tho' the corporation is not a party in the dispute. *Rex v. the Hostmen of Newcastle*, H. 18 G. 2. *Str.* 1223.]

[A stranger affected by a bye-law has a right to inspect and take copies. *Barnes*, 236.]

[Every one has a right to inspect the books of the sessions; for they are public books. *Herbert v. Ashburner*, H. 24 G. 2. 1 *Wils.* 297.]

[If a man sued and taken in execution in a court of conscience, brings trespass, &c. for it, he shall have liberty to inspect the books as far as relates to the suit against him. *Wilson v. Rogers*, M. 19 G. 2. *Str.* 1242.]

[Defendant, lord of a manor, who insists on a *modus*, not obliged to produce court-rolls to shew what proportions of it are paid by the other defendants, tenants of the manor. *Bishop of Hertford v. Duke of Bridgewater*, T. 1729, *Bunb.* 269.]

[The tenant of a manor has a right to inspect the court-rolls, but he cannot have a rule for it, without affidavit that he has applied for it, and been refused. *Barnes*, 236, *et seq.*]

[Leave to inspect the court-rolls of a manor will be granted of course on the application of a tenant of the manor, who has been refused that permission by the lord. *Rex v. Shelley*, H. 29 Geo. 3. 3 *T. R.* 141.]

[A tenant has no such right, unless there be some cause depending in which right may be involved. *Rex v. Allgood*, T. 38 Geo. 3. 7 *T. R.* 746.]

[In an action brought by the corporation for toll against the defendant, the court on his application granted a rule for inspection of such parts of the deeds, &c. as related to that matter, on the town-clerk, which he was to give upon oath. *Barnstable v. Lathey*, B. R. E. 29 Geo. 3. 3 *T. R.* 303.]

[Where a rule had been granted for an information in the nature of *quo warranto* against A., to shew by what authority he claimed to be mayor of G. on the relation of some of the corporators; and another rule in that cause for inspecting *all* the corporation-books, papers, &c. directed to the town-clerk. An inspection of such only as related to the election and office of mayor, was held to be a sufficient compliance with the rule, so as to protect the town-clerk from an attachment as for a contempt of the court, it appearing that he had acted *bonâ fide*. *Rex v. Babb*, H. 30 Geo. 3. 3 *T. R.* 579.]

[Where an information is filed by the attorney-general against an officer of the *East India Company* on charges of delinquency there, founded upon the report of a board of inquiry in *India*, the defendant has not right to have an inspection of that report, nor has the court of B. R. any discretionary power to grant it. *Rex v. Holland*, E. 32 Geo. 3. 4 *T. R.* 691.]

[But if lord of manor brings ejectment for lands, claiming them as copyhold, against defendant, who claims them as freehold, defendant

ant shall not have rule to inspect the court-rolls. *Smith v. Davit*, T. 18 G. 2. 1 *Wils.* 104.]

[On information by attorney-general against vice-chancellor of *Oxford*, for misdemeanor in his office, the crown shall not inspect the archives and statutes of the university. *Rex v. Purnell*, H. 2 G. 2. 1 *Wils.* 239.]

[On a rule to shew cause against information *quo warranto*, by what right defendant claims to hold a court-leet in a borough, defendant shall not have a rule to inspect the corporation-books, for it is a matter of private claim between the parties. *Rex v. Bridgeman*, H. 17 G. 2. *Str.* 1203.]

[On an information against justices of a corporation, for taking money for granting ale-licences, prosecutor shall not have a rule to inspect the corporation-books. *Rex v. Cornelius*, T. 17 G. 2. *Str.* 1210.]

[A company (as *East-India Company*) shall not be obliged to produce books of letters in a cause where they are not concerned. *Shilling v. Farmer*, M. 12 G. *Str.* 646. *Murray v. Thornhill*, M. 13 G. *Str.* 717.]

[Post-office not obliged to produce books in suits where they are not party. *Crew v. Saunders*, H. 8 G. 2. *Str.* 1005.]

[The court will not make a rule to inspect the books of a company plaintiff, if it is not a public company; but defendant may give notice to have them produced at trial. *Charitable Corporation v. Woodcroft*, T. 8 G. 2. *B. R. H.* 130.]

[The books of a company, not a corporation, nor trustees for a party, shall not be inspected. *Barnes*, 36.]

[Plaintiff in trespass for toll taken of him has not right to inspect the books of the corporation, whose servant took toll. *Hodges v. Atkis*, H. 13 G. 3. 3 *Wils.* 398.]

[A lessee of the dean and chapter of *Canterbury* defendant, in ejectment at the suit of their trustee, shall not have liberty to inspect their books. *Ord v. Stubbs*, T. 11 & 12 G. 2. *Andr.* 47.]

[Where two parties bet on a certain event, to ascertain which it is necessary to inspect the public revenue books, the public officer, tho' served with a *subpœna duces tecum*, is not bound to produce them. 2 T. R. 616.]

[The court of *B. R.* will not grant a *certiorari* to remove the land-tax assessments, on account of the many inconveniences to the public which attend such proceeding. But that there may not be a failure of justice, if an application be made for an information against the commissioners of the land-tax, they will admit an attested copy of the assessment instead of the original. 2 T. R. 234.]

#### (C 1.) Proceedings in Courts.

(C 1.) *A decree, sentence, &c.*] So, writings without seal are oftentimes evidence.

As, all proceedings in courts of justice.

And therefore, a decree in the court of *Chancery*, or *Exchequer*, shall be evidence against the party, if an exemplification of it be produced under the seal of the court. 1 *Keb.* 21. 2 *Mod.* 231.

Or, a decretal order in paper, with proof of the bill and answer. 1 *Keb.* 21.

So,

So, if the bill and answer be recited, it is sufficient. *Cont. 1 Keb. 21. Semb. per Trevor at Guildhall, 9 Ann. inter Wheeler and Lowth.*

But a decree, which does not recite the bill and answer, shall not be allowed. *Per cur. Twissd. cont. 1 Keb. 21.*

So, a sentence in the spiritual court, in a matter within their cognizance, shall be evidence of the right to the thing there decreed; as, a sentence for tithes. *R. 2 Rol. 679. l. 25. 2 Mod. 231.*

[Sentence in the spiritual court, in a cause of jactitation, is conclusive evidence against a marriage. *Clews v. Bathurst, H. 7 G. 2. Str. 960. Hatfield v. Hatfield, in Parliament, 1725, Str. 961. Vide the Duchess of Kingston's case, Ambler, 756. acc. tho' there is an appeal entered, and tho' sentence was given after issue joined at common law. B. R. H. 11.]*

[Sentence in spiritual court in a cause of contract, is conclusive evidence, on *non assumpsit* pleaded, in an action on contract of marriage. *Da Costa v. Villa Real, H. 7 G. 2. Str. 961. B. R. H. 18.]*

[Sentence in ecclesiastical court for fornication, &c. in a criminal way, is not evidence against the issue; otherwise, if a sentence on the point of the marriage, and no collusion. *Brownsword v. Edwards, H. 1750, 2 Vesey, 243.]*

A sentence in the Admiralty, which condemns goods as piratical, in *trover* for the same goods, upon the libel and answer produced shall be evidence. *Per Trevor, 9 Ann. inter Wheeler and Lowth.*

[In an action on a policy of insurance on goods warranted *American*, on board a ship from *London* to *Virginia*, a sentence of a foreign court, which, after reciting that "forasmuch as the true destination of the vessel was for the *English* islands, having been hired and loaded at *London*, and having on board eighty barrels of gunpowder, declares "the ship and cargo a good prize," is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion. *Calvert v. Bovill, B. R. H. 38 Geo. 3. 7 T. R. 523.]*

[By the sentence of a *French* court of admiralty it appeared that the ship insured warranted *American*, had been condemned as enemy's property for want of having on board a *role d'equipage*, or list of the crew, such as is required by a marine ordinance of *France*, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between *France* and *America*; and this was holden to be conclusive evidence against the warranty of neutrality, tho' in fact the ship was *American*. *Geyer v. Aguilar, B. R. T. 38 Geo. 3. 7 T. R. 681.]*

Or, without producing the libel, if it be not found in the office, nor usually filed there. *Per Trevor. Ibid.*

[But sentence of a foreign admiralty, condemning a ship as unfit, cannot be read in an action on the charter-party, which is a contract under seal at land. *Burton v. Fitzgerald, T. 10 G. 2. Str. 1078.]*

[So, a sentence of expulsion from a college in one of the universities, is good evidence, unless reversed by appeal; and while it continues unreversed, no evidence can be admitted, to prove its irregularity. *Cowp. 315.*

So, a probate of a testament for personal estate, and a grant of administration.

So,



So, a judgment in a court-baron, hundred, or county-court, with proof of the proceedings upon which the judgment was given.

[Judgment of *ouster* against bailiffs of a corporation, is good evidence against one making title as elected under their bailiffship. *Rex v. Hebden*, P. 12 G. 2. Str. 1109.]

[Two allowances in *eyre*, temp. Ed. 1. and judgment in trespass, temp. Ed. 3. are not *conclusive* evidence of a right to wreck; and usage for 92 years last is stronger. *Biddulph v. Ather*, T. 28 & 29 G. 2. 2 Will. 23.]

[Duplicate of insolvent debtor's discharge at sessions, is evidence of his discharge. *Gillam v. Stirrup*, T. 8 G. 2. B. R. H. 145.]

[But not of any fact which is the foundation of their jurisdiction. *Ibid. Savage v. Field*, M. 9 G. 2. B. R. H. 186.]

[If it recites that due notice was given, and the person who gave the notice is dead, it shall be evidence that 30 days notice was given. *Ibid.*]

[A condemnation in a foreign attachment, which appears to be subsequent to action in C. B., is no evidence. *Barnes*, 195.]

[On a libel in the consistorial court for disturbance in the plaintiff's right to a pew, that court adjudged the *right* to be in the plaintiff, and admonished the defendant not to sit in the pew; the court of arches *reversed* the sentence, but also admonished the defendant not to use the pew again: these sentences were held not to be *conclusive* evidence of the plaintiff's right in an action for a disturbance, between the same parties. 3 T. R. 639.]

[A certificate by justices of the peace that a highway (indicted) is in repair, is a legal instrument recognized by the courts of law, and admissible in evidence after conviction, when the court are about to impose a fine. *Rex v. Marubey*, E. 36 Geo. 3. 6 T. R. 619.]

[The original precept from the sheriff to the returning officer of a borough, to proceed to an election, is admissible evidence to prove the allegation in a declaration that such a precept issued, &c. *Mead v. Robinson*, C. P. T. 16 & 17 Geo. 2. Willes, 422.]

(C 2.) *A bill.* So, a bill in *Chancery*, or *Exchequer*, shall be evidence against the plaintiff himself, if it was exhibited with his privity. 1 Sid. 221. R. Ca. Ch. 65.

And if there was answer, and other proceeding upon it. Ca. Ch. 65. 1 Sid. 221.

And the proceedings upon a bill import, *prima facie*, that it was with his privity. Per Tracy, 5 Ann.

[A bill in *Chancery* is no evidence of the facts contained therein, not even of those on which the prayer of relief is founded. *Bowerman v. Sybourn*, B. R. M. 37 Geo. 3. 7 T. R. 2.]

[Copy of a bill in *Chancery* wrote *close* on treble six-penny stamps may be read. *Qu.* Whether one three-penny stamp is not sufficient. *Denn v. Fulford*, T. 1 G. 3. 1 B. M. 1177.]

(C 3.) *An answer.* So, an answer by any in *Chancery*, in his own right, shall be evidence against himself, with proof of the bill filed. Godb. 326. Vide *Chancery*, (T 6.)

So, an answer to interrogatories is evidence against himself.

So,

So, an answer to a libel in the spiritual court; for it is tantamount to a confession. *Per Tracey, 6 Ann. 1 Ver. 53.*

But an answer by guardian shall not be evidence against the infant. *R. 2 Vent. 72. 3 Mod. 259.*

Nor, an answer of a trustee against the *cestuy que trust*. *1 Keb. 281.*

Nor, the answer of a vendor against an alienee. *1 Sal. 286. Mod. Ca. 44.*

If an answer be read in part against him, he may insist that the whole shall be read. *R. 5 Mod. 10.*

[The answer of one of the parents to a child to a bill in Chancery, is admissible to prove the time of the birth of the child, whether *before* or *after* marriage: it is not like offering a deposition or an answer against a party to the original suit; it is offered only as evidence under the parent's hand of his or her having made such a declaration. *Cowper, 594. Vide Testimoigne.*]

(C 4.) *A deposition.*] So, a deposition, regularly taken upon a bill and answer in *Chancery*, shall be evidence against the party to the suit, or any who claim under him, if the bill and answer are proved to be filed. *1 Keb. 685. 4 Mod. 146. 1 Sal. 279. Vide Chancery, (T 4, 5.)*

Tho' the bill was dismissed for want of equity. *Ca. Ch. 175. Per Holt, 7 W. 3.*

So, if it be proved that a bill and answer were filed, by the six clerks' book, by mentioning them in the enrolment of the decree, it is sufficient, tho' they are now lost. *R. 5 Mod. 211.*

So, an exemplification of an ancient deposition was allowed where the records were burnt, tho' the bill and answer were not recited; for the recital was not usual before 1630. *2 Keb. 31.*

[The deposition of a person examined in Chancery may be used in a suit of law between the same parties, if he is dead, cannot attend thro' sickness, or is not amenable. *Fry v. Wood, P. 1737, 1 Atkyns, 445.*]

[In the court of Chancery, depositions taken in one cause are frequently read in another, saving all just exceptions, as that they are not between other parties, &c. By Lord Kenyon Ch. J. *Rex v. Jolliffe, T. 31 G. 3. 4 T. R. 290.*]

But a deposition shall not be evidence at law, except where the witness is dead. *1 Sal. 286.*

Or, cannot attend by reason of sickness, or cannot be found. *Sbo. 363.*

[It is a general rule in evidence, that the deposition of a living witness ought not to be received, unless it appear that the witness himself could not be produced to be examined *ore tenus*. By Lee Ch. J. cited by Buller J. *Rex v. Eriswell, T. 30 G. 3. 3 T. R. 715.*]

[The depositions of the act of bankruptcy, when recorded according to the *st. 5 G. 2. c. 30. s. 41.* are evidence in an action of law, to prove the precise time when the act of bankruptcy was committed, if specified therein. *Janson v. Wilson, B. R. M. 20 G. 3. Dougl. 257.*]

[So, in an action against the assignee of a bankrupt for a creditor's share, under an order of commissioners of bankrupt for a dividend,

the proceedings before the commissioners are conclusive evidence of the debt. *Brown v. Bullen*, B. R. E. 20 G. 3. *Dougl.* 407.]

[Tho' taken 50 years before. *Benson v. Olive*, M. 5 G. 2. *Str.* 920.]

Tho' the witness afterwards becomes interested, whereby he is disabled to be a witness. R. 2 *Ann.* 1 *Sal.* 286. [*Vide* 2 *Ver.* 700. 1 *P. W.* 288, &c. 1 *Str.* 101.] *Vide Testmoigne*, (C 1, &c.)

Nor, against him who is no party to the suit, nor claims under one. *Hob.* 112. 2 *Rol.* 679. l. 35.

Nor, for a stranger, against a party to the suit; for, not being evidence against him, it shall not be allowed for him. R. *Hard.* 472.

Nor, for a stranger to the suit against a purchaser under the party; tho' the cause there was of the same nature as now. *Hard.* 22.

So, it shall not be evidence, if the bill was dismissed for irregularity. R. *Ca. Ch.* 175.

If taken *ex parte*, without answer to the bill. 2 *Jon.* 164.

Tho' the bill was *ad examinandum in perpetuam rei memoriam*. R. *Ray.* 336. *Dub.* 1 *Sal.* 279. *Sho.* 363.

[The court will not give leave for witnesses, prisoners in execution, to be examined, and their depositions read in evidence, without consent. *Barnes*, 222, 223.]

[No examination shall be read, tho' signed by a magistrate, unless signed by the party. *Tireman v. Henwell*, T. 9 G. 2. B. R. H. 306.]

[An affidavit filed in court on a motion, may be read in evidence at the sittings in the same court, without proof of its being sworn. 2 *Bl. Rep.* 1190.]

[The examination of a pregnant woman, taken before a justice of the peace, under the *st.* 6 G. 2. c. 31. is admissible evidence on an application to the quarter sessions to make an order of filiation on the putative father, even tho' the woman die before such application can be made. *Rex v. Ravensstone*, M. 34 G. 3. 5 T. R. 373.]

[The mutiny act enables two justices to take the examination of a soldier respecting his settlement, and directs them to give an attested copy to the soldier, to be by him delivered to the commanding officer, in order to be produced when required, and makes such attested copy evidence; it was holden, that no other attested copy than that given to the soldier is evidence. *Rex v. Clayton le Moors*, T. 34 G. 3. 5 T. R. 704.]

[The original examination is admissible evidence, as well as the attested copy. *Rex v. Warley*, H. 36 G. 3. 6 T. R. 534.]

#### (C 5.) Parol Evidence.

[Parol evidence shall not be admitted to annul or substantially vary a written agreement. 3 *Will.* 275.]

[As, where A. had two fields, called *Millcroft* and *Boreham*, and B. came to an agreement in writing with A. to exchange with him a copper-mill, &c. in consideration that A. would permit him to take the grass and vesture of hay from off *Boreham*, which writing was signed by both parties and attested; it was held that the witness should not be permitted to give evidence that it was understood that A. should have the grass, &c. of *Millcroft*. *Ibid.*]

[So



[So, parol evidence shall not be received to prove an additional rent, payable by a tenant beyond that expressed in the written agreement for a lease. 2 *Bl. Rep.* 1249.]

[So, where plaintiff covenants to build two houses for a certain sum, by a certain day, and avers in an action of covenant for the money, that the houses were built within the time; evidence that the time had been enlarged by *parol* agreement, and the houses finished within the enlarged time, cannot be received. 3 *T. R.* 590.]

[So, also in case of a bond. *Id.* 592.]

[Nor, shall parol evidence be admitted to explain a writing, where the meaning is plain. *Str.* 794.]

[As, if a man agree in writing to sell *Blackacre* for 1000 *l.*, *parol* evidence shall not be admitted that he intended *Whiteacre* should also pass. 3 *Wilf.* 276, 7.]

[So, if a man devise in these words, "I give to my loving brother 1000 *l.*, and in case of his death to his wife," if the husband survive the testator, the legacy vests absolutely in him, and after his death, his wife executrix shall not be permitted to give parol evidence that the testator had said *in extremis* that he meant only to give his brother the interest of 1000 *l.*, and that the wife should have the principal in case she survived her husband. *Str.* 1261.]

[But where the meaning of a written instrument is ambiguous, parol evidence may sometimes be admitted to explain it; as, if there be two persons of the same name, or two pieces of land of the same name, *parol* evidence may be admitted, to shew which of the two persons is meant in a will, or which of the two pieces of land in a deed. *D.* 3 *Wilf.* 276.]

[So, parol evidence may be admitted to explain the intent of a testator in cancelling a will. *Cowp.* 53.]

[Parol evidence may be admitted to explain a latent ambiguity in will or codicil. *Walpole v. Cholmondeley*, *B. R. H.* 37 *G.* 3. 7 *T. R.* 138.]

[But where the deviser made one will in 1752, and another in 1756, without disposing of his personalty, or appointing executors by either; and by a codicil (reciting that by his *last will*, dated in 1752, he had made no disposition of his personalty) disposed of it, and appointed executors; it was holden that there was no latent ambiguity, so as to let in parol evidence to shew that the testator intended by the codicil to confirm the will of 1756, and not to republish that of 1752. *Ibid.*]

[Parol evidence may be given of questions asked by the testator at the time of executing his will, Whether the contents were the same as those of a former will? to which he was answered in the affirmative, in order to set aside the latter will on the ground of fraud. *Small v. Allen*, *B. R. H.* 39 *G.* 3. 8 *T. R.* 147.]

[If the abandonment of a contract be made the ground of an action, it is not competent to the plaintiff to shew that a contract has existed and been abandoned, without proving the specific contract. *Walker v. Constable*, *C. P. T.* 38 *G.* 3. 1 *Bos. & Pull.* 306.]

[*Vide Chancery*, (2 *C* 3, 4.)—*Devise*, (F 2.—N 25.)]

[Parol evidence may be admitted to prove other considerations than those mentioned in a deed; as, where the considerations mentioned in the deed were 10,000 *l.* and natural love and affection, and the premises were worth 30,000 *l.*, and issue was directed to try

whether natural love and affection made any part of the consideration; and it being found that they did not, the deed was set aside. 7 *Brown's P. C.* 70. cited by Lord Kenyon, 3 *T. R.* 473.]

[So, where the consideration expressed in a deed was only 28*l.*, parol evidence was admitted to prove that 30*l.* was the real consideration. *Ibid.*]

[So, where a certain parish consisted of several hamlets having separate churchwardens and overseers; a certificate having been granted by some of them, describing themselves as officers of the *parish at large*, evidence was admitted to shew that they were the officers of the *hamlet* in which the pauper was settled; because such evidence did not contradict, but only explained the certificate. 3 *T. R.* 609.]

[Parol evidence ought not to be admitted in a case where there has been a written agreement, tho' that agreement cannot be received from the want of a proper stamp. *Rex v. St. Paul's, Bedford, M.* 36 *Geo.* 3. 6 *T. R.* 452. *Vide supra.*]

[Parol evidence of an order of removal, proved to be lost, is sufficient. *Rex v. Metherringham, H.* 36 *G.* 3. 6 *T. R.* 556.]

(C 6.) What Evidence is necessary.

[If a sheriff's officer, on a *fi. fa.* take the goods of a stranger; to an action by the stranger, the officer must not only produce the *fi. fa.* in evidence, but also a copy of the judgment on which the *fi. fa.* was issued. 1 *Ld. Raym.* 733. 2 *Bl. Rep.* 701. *Vide Doug.* 41.—*Escape*, (B 1.)]

[A member of parliament moving to be discharged on privilege, must produce in evidence the return of his writ of election. 2 *Bl. Rep.* 788.]

[In debt *qui tam* for extorting illegal fees, if the plaintiff set forth the judgment on which the writ was founded, he must also prove it. *Id.* 1101.]

[In an action by an incumbent for money had and received against one who has taken the fees due to him in right of his living, is not necessary for the plaintiff to prove his having read the articles, &c. unless something appear to raise a presumption to the contrary. 2 *Bl. Rep.* 852.]

[The evidence must be such as to support the declaration, &c.; thus where a breach of covenant was assigned, "that the defendant "had not used a farm in an husband-like manner, but on the contrary "had committed waste," it was held, that the plaintiff could not give evidence of the defendant's using the farm in an unhusband-like manner, that not amounting to *waste*. 3 *T. R.* 307.]

[So, a corrupt agreement for the forbearance of money, *till one or the other of two days*, at the option of the borrower, must be pleaded according to the fact in the *alternative*; and if it be stated as an absolute forbearance *till one* of those days, the evidence will not support the plea. 3 *T. R.* 531.]

[But where an averment is only matter of inducement to the action; it is not necessary that it should be precisely proved. *D. per Buller*, 3 *T. R.* 646.]

[Thus, where in a declaration on the 11 *G.* 2. c. 19. s. 3. to recover double the value of goods removed to prevent a distress, there was an averment, "that 57*l.* was due for rent," it was held, that this

this need not be precisely proved as laid, the gift of the action not being on the quantity of the rent due, but on the value of the goods removed. 3 T. R. 643.]

[And it is not in all cases necessary to prove every thing that must concur to constitute the character in which the plaintiff sues, or that in which the defendant is sued; it is sufficient to shew, by the defendant's own acts, that he has acknowledged himself to fill the respective characters.]

[Thus, in an action for penalties on 27 G. 3. c. 26. (by which the duties on post-horses, leviable under the 25 G. 3. c. 51. were transferred from the government to the farmers of the tax,) brought by the farmer of the tax, it is not necessary for the plaintiff to give in evidence his appointment by the lords of the treasury or the commissioners of the stamp-duties, authorised by them; proof that the defendant has accounted with him, *as farmer*, for the duties, is sufficient. 3 T. R. 632.]

[So, in an action on the post-horse act, against an inn-keeper for penalties incurred, it is not necessary to shew the licence itself of the defendant; but as *against him*, other evidence is sufficient; as, that he had written over his door, "Licensed to let post-horses." *Id.* 637.]

[So, in an action for non-residence, evidence that the defendant did several acts as *parson*, such as receiving tithes, &c. is sufficient, without proving his admission, institution, and induction. *Id.* 635.]

(C 7.) What Evidence shall be admitted.

[An allegation in an action for a false return to a *mandamus* of a custom of payment by the chapel-wardens of *A.* to the church-wardens of *B.*, may be supported by evidence of a custom of payment to officers acting only for the *township* of *B.*, not co-extensive with the parish of *B.*, but who have always been described as the church-wardens of *B.* *Stead v. Heaton*, B. R. E. 32 G. 3. 4 T. R. 669.]

[An assignee cannot maintain trover for goods collusively sold on the evidence of bankruptcy, without proof of a demand and refusal. *Nixon v. Jenkins*, C. P. E. 33 G. 3. 2 H. Bl. 13.]

[A declaration of a bankrupt of his motive for absenting himself from his home, made at the time, is evidence in an action by the assignees, against a creditor of the bankrupt's, in order to prove the act of bankruptcy. *Bateman v. Bailey*, B. R. H. 34 G. 3. 5 T. R. 512.]

[*A.* draws a bill of exchange on *B.*, payable to a fictitious payee or order, and indorsed in the name of such payee, which *B.* accepts. In an action by an innocent indorsee for a valuable consideration against *B.* on the bill, in order to draw an inference, either that *B.* at the time of his acceptance knew the name of the payee to be fictitious, or that *B.* had given an authority to *A.* to draw the bill in question, by having given a *general* authority to *A.* to draw bills on *B.*, payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by *A.* on *B.*, payable to fictitious payees, and accepted by *B.*, tho' none of those transactions or circumstances have any apparent relation to the bill in question, and tho' none of them prove that *B.* accepted any of those other bills with a knowledge that the payees mentioned in them were fictitious. *Gibson v. Hunter*, House of Lords, E. 34 G. 3. 2 H. Bl. 288.]



[An instrument executed abroad, and witnessed by a foreigner residing there, may be proved by evidence of the hand-writing of the witness, and of the contracting party, but not by the latter alone. *Barnes v. Trompowsky*, B. R. E. 37 G. 3. 7 T. R. 265.]

[On a *special plene administravit*, and issue thereon, if assets be proved in the defendant's hands, he may give evidence of the payment of other debts with those assets, previous to the action brought. 2 Bl. Rep. 105.]

[But no new matter foreign to the issue joined, is admissible in evidence; therefore, if to an action of trespass and false imprisonment the defendant plead matter which amounts to a justification, and the plaintiff reply generally, *de injuria sua propria absque tali causa*, he cannot give in evidence any thing in avoidance of the justification; as, a refusal to admit the plaintiff to bail, where the offence for which he was committed was bailable. 2 Bl. Rep. 1165.]

[Evidence of an order of restoration of a burgess, together with proof of his having acted as such, is sufficient to shew that he was a burgess *de facto*, without proving that he was actually admitted. Cowp. 502.]

[Indecency of evidence is no objection to its being received, where it is necessary to the decision of any civil or criminal right. Cowp. 734.]

[Otherwise, if it arise on a voluntary wager between two indifferent persons; as, on a wager concerning the sex of a third person. *Id.* 736.]

[Matter of defence happening after the action brought, but before plea pleaded, may be given in evidence in those actions where special matter may be proved on the general issue. Doug. 106.]

[In an action brought on the stat. 17 Geo. 3. c. 57. by the proprietor, against the pirater, of the print, it is not necessary to produce the plate in evidence, one of the prints taken from it is sufficient. *Thompson v. Symonds*, B. R. M. 33 Geo. 3. 5 T. R. 41.]

[Evidence that the defendant acted a piece on the stage, of which the plaintiff had bought the copy-right, is not evidence of a publication by the defendant within the meaning of the stat. 8 Ann. c. 19. *Coleman v. Wathen*, B. R. E. 33 Geo. 3. 5 T. R. 245.]

[Under a count for money had and received by three defendants, the plaintiff cannot give in evidence money had and received by them, and by a fourth partner who is now dead. *Spalding v. Mure*, B. R. T. 35 Geo. 3. 6 T. R. 363.]

[A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, is supported by evidence that defendant's servant drove the cart. *Brucker v. Fromont*, B. R. E. 36 Geo. 3. 6 T. R. 659.]

[The defendant may give in evidence the declarations or admissions of the plaintiff on the record to defeat the action, tho' such plaintiff appear to be only a trustee for a third person. *Bauerman v. Radenius*, B. R. T. 38 Geo. 3. 7 T. R. 663.]

[In debt on bond, if one of the attesting witnesses be dead, and the other beyond the process of the court, it is sufficient to prove the hand-writing of the witness who is dead. *Adam v. Kerr*, C. P. M. 39 Geo. 3. 1 Bof. & Pull. 360.]

[*Quare*, Whether evidence of a custom in Jamaica to execute bonds by substituting a mark with a pen for a seal, be admissible in support of a declaration on a bond sealed, &c. ? *Ibid.*]

## Demurrer to Evidence.

*Vide Pleader, (Q 10.)**Vide more concerning Evidence, in title Testmoigne.*

## E X A C T I O N.

*Vide Extortion,—Officer (G 15.—H).*

## E X A M I N A T I O N.

*Vide Bankrupt, (D 6, &c.)—Chancery, (P 1, &c.)—Trial, (B 4, 5.)*Examination in *perpetuam Rei Memoriam*.*Vide Chancery (R).*

## E X A M I N E R.

*Vide Chancery, (P 1, &c.)*

## E X C E P T I O N.

## Exceptions to an Answer.

*Vide Chancery (L).*

## Exceptions to a Master's Report.

*Vide Chancery, (W 3.)*

## Exception in a Deed.

*Vide Fait, (E 5, &c.)*

## Exception in a Devise.

*Vide Devise, (N 23.)*

## Exception in a Pardon.

*Vide Pardon (I).*

## E X C H A N G E.

## (A) Exchange.

(A 1.) What shall be a good one.

**A**N exchange is, when a man gives lands and tenements to another in exchange for other lands or tenements of an equal quantity in estate with that given to him. *Co. L. 50.*

H 4

And

And to such exchange the word *excambium* is requisite; for it cannot be supplied by any *periphrasis*, or circumlocution. *Co. L. 50. b.*

So, an exchange may be made of things in grant; as, an advowson, rent, common, &c. *Co. L. 50. a.*

So, of a thing in grant, for land; as, a rent.

Tho' it be a rent created *de novo*. *Co. L. 50. b.*

So, a release of a rent, *estovers*, or a right to land, &c. shall be good in exchange for land; for there needs not any transmutation of possession. *Co. L. 50. b.*

So, tithes for land. *Ibid.*

A tenure by divine service, for a temporal feigniory. *Ibid.*

An exchange shall be good, tho' the estates are not equal in value. *Lit. f. 65.*

So, two joint-tenants may exchange their lands, for lands to them in jointure or in common. *Co. L. 51. a.*

An exchange of lands, both being in the same county, shall be good without deed. *Co. L. 50. [Vide the ff. 29 Car. 2. 3.]*

(A 2.) When it shall not be good.

But an exchange is not good, without the word *excambium*. *Co. L. 50. b.*

So, an exchange will not be good, if it be not of estates equal in their extent and duration; for, if land in tail be given in exchange for land in fee, it will be void. *Lit. f. 64.*

Or, an estate-tail, for an estate for life. *Lit. f. 65.*

Or, an estate in tail general, for an estate in tail special. *Lit. f. 65.*

So, it will not be good without deed, if the land of either party lies in a different county. *Co. L. 50. a.*

Or, if it be made of things which lie in grant. *Co. L. 50. a. [Vide the ff. 29 Car. 2. 3.]*

So, an exchange is not perfect, till it be executed by entry. *Co. L. 50.*

And therefore, if one of the parties dies before entry, the exchange shall be void; for the heir cannot enter. *Co. L. 50. b.*

[Neither can an exchange be made between more than two parties, 3 *Willf.* 497.]

[And therefore, if *A.*, *B.*, and *C.* make an agreement, which is afterwards confirmed by act of parliament, that *B.* shall have certain land of *A.*, in consideration of which *A.* shall have certain other land of *C.*, and *C.* certain other land of *B.* The act of parliament saving the rights of all persons except of *A.*, *B.*, and *C.*, and *B.* being only tenant for life, *C.* after his death is evicted by the reversioner, *C.* shall not recover back the land from *A.* *Ibid.*]

[The same law holds with respect to an agreement relating to advowsons. *Ibid.*]

*Vide* more concerning Exchange, in *Chancery* (3 H).—*Enfant*, (B 3.)

### Bill of Exchange.

*Vide Action upon the Case upon Assumpsit*, (A 2.)—*Merchant*, (F 4, &c.)



## EXCHEQUER.

*Vide Courts*, (D 1, &c.)—*Disfmes*, (M 13, &c.)—*Pleader*, (3 B 4.)  
—*Scotland*, (D 14.)

## Exchequer-Chamber.

*Vide Courts*, (D 5, &c.)—*Pleader*, (3 B 5.)

## Exchequer Seal.

*Vide Patent*, (C 3.)

## EXCOMMENGEMENT.

## (A) Excommunication.

(A 1.) What Effect it shall have.

**E**Xcommunication is, when a man by sentence of the ordinary is deprived of communion with the church of God.

And there is a *major* or a *minor* excommunication: by the *minor* he is deprived only of participation of the sacraments. *Co. L. 133. b.*

By the *major* excommunication he shall be deprived *de fidelium communione & ab omni actu legitimo*. *Ibid.*

*Cum excommunicato nec orare, nec loqui palam aut absconditè, nec vesci licet*. *Ibid.*

And therefore, if a plaintiff sue an action real, personal, or mixt, it is a good plea in disability of his person, *that he is excommunicated*. *Lit. f. 201. Vide Abatement*, (E 7.)

Where a statute says that a man shall be excommunicated *ipso facto*, there needs no sentence of excommunication. *1 Vent. 146.*

Yet he shall not be excommunicated till the conviction for the offence be transmitted to the ordinary. *R. 1 Vent. 146. Semb. Cro. El. 919.*

But after excommunication the ecclesiastical court cannot send a *pursuivant* or letters *missive* to take him; for they ought to make a certificate, and upon that a *capias excommunicatum* issues. *R. Cro. El. 741.*

And upon this writ they shall not break a house in the night to take the person. *Cro. El. 741.*

(B) The Writ *de Excommunicato capiendò*.

(B 1.) When it lies.

**I**F a man be excommunicated and continues in contempt for 40 days, upon certificate by the ordinary to the *Chancery*, a writ *de excommunicato capiendò* issues. *Cro. El. 741.*

And

And by the *ft. 9 Ed. 2. 12.* such writ shall not be denied, tho' it be against the king's tenant.

By the common law, such writ was returnable in *Chancery*. 1 *Sal.* 293.

And needed not to mention any cause but for contempt; for the cause appeared to the *Chancery* by the *significavit* of the bishop. *Ibid.*

But since the *ft. 5 El. 23.* the cause of excommunication ought to be mentioned in the writ, whereby *B. R.*, where it is returnable by that statute, may judge of it. 1 *Sal.* 239.

By the *ft. 5 El. 23.* the writ of *excommunicato capiendo* shall bear *teste* in term, and be returnable in *B. R.* some day in the next term, and there shall be 20 days between the *teste* and return.

If it was not returned, by the common law there was an *alias* and *pluries*, and afterwards an attachment against the sheriff, returnable in *B. R.* *F. N. B. 62. O.*

And now, by the *ft. 5 El. 23.* the writ made and sealed shall be brought into *B. R.*, and there delivered of record to the sheriff, who, failing to make return, shall be amerced at the discretion of the justices.

If the party live in *Wales*, any county palatine, or *cinque port*, the *significavit* into *Chancery* shall be sent by *mittimus*, &c. and they shall direct process to their officers there.

And if a writ of *excommunicato capiendo* be delivered upon record in *B. R.*, process goes from that court till the party be taken, without resorting to *Chancery* for a new original.

Tho' it be not for any of the causes mentioned in the statute. *R. 1 Rol. 174.*

[It lies on an appeal and complaint of nullity; for it is their form to which regard must be had. *Rex v. Eyre, T. 16 G. 2. Str. 1189.*]

[If a judge *ex officio* excommunicates a man who appeals, he must make the judge a party, for there can be no other; and if the superior jurisdiction thinks he has done the man an injury, he shall pay costs, and be excommunicated for non-payment. *Ibid.*]

[If the writ is issued from *Chancery*, opened and inrolled in *B. R.*, and on exceptions taken a rule made, for prosecutor to shew cause why the delivery of the writ to the sheriff should not be stayed, and before that can be done the return is out, another writ may be sued out from *Chancery*, not from *B. R.* *Ibid.*]

[This writ is directed to the sheriff; and therefore if a prisoner for debt in *Newgate* is removed to the *Fleet*, and afterwards excommunicated, *Chancery* will not order the curfitor to make out a writ directed to the warden of the *Fleet*, but it must be directed to the sheriff, who may return *non est invent.* into *B. R.*, and that court will grant *hab. corp.* and then charge the prisoner with *excommunicato capiendo*. *Strudwick's Case, T. 1730, 3 P. W. 53.*]

(B 2.) What ought to be done previous.

(B 2.) *A certificate of the contempt. By whom it shall be made.* Before the writ of *excommunicato capiendo* be granted, there ought to be a certificate to the *Chancery* of the contempt of the party, by the ordinary by his letters under seal. 1 *Sal.* 293.

And

And such certificate ought to be by the bishop, or immediate ordinary.

As, by the archdeacon of *Richmond*. *Co. L.* 134. *a.*

By the guardian of the spiritualties in the time of vacation; as, by the dean and chapter, archbishop, &c. if he be guardian of the spiritualties. *F. N. B.* 62. *N.* *Co. L.* 134. *a.*

So, if the bishop be *in remotis*, viz. beyond sea, or out of his diocese, the certificate may be by his chancellor, or vicar-general. *F. N. B.* 62. *N.*

And the certificate shall be good, tho' the bishop be not *in remotis*; for that is not traversable. *F. N. B.* 62. *N.*

So, a bishop elect may make a certificate before he be consecrated. *Co. L.* 134. *a.*

But none except the bishop or other ordinary, that is immediate officer to the king's courts, regularly can make a certificate of excommunication. *Co. L.* 134. *a.*

And therefore, upon the pope's bull certifying an excommunication, the writ of *excommunicato capiendo* did not go. *F. N. B.* 64. *F.*

Nor, upon a certificate that another bishop certified him of it. *F. N. B.* 65. *a.*

Nor, upon the certificate of an official, commissary, abbot, &c. *F. N. B.* 64. *F.*

(B 3.) *In what manner.*] The certificate of the bishop ought to signify that he has been excommunicated for 40 days. *F. N. B.* 64. *D.* 12 *Co.* 76.

That he was excommunicated by special name, and in a special suit against him *ex officio*, or by the party; for otherwise he does not incur the greater excommunication. *F. N. B.* 64. *F.*

That he was commorant within the diocese of the bishop, by whom he is excommunicated. *R. Mo.* 467. *Semb. Latch*, 174.

[It is not necessary that the defendant should be resident in the diocese at the time of the excommunication; it is sufficient if he were there at the time of the citation. *Rex v. Payton*, *H.* 37 *Geo.* 3. 7 *T. R.* 153.]

By what bishop he was excommunicated. *R. Mo.* 775.

And for what cause articles were exhibited. 1 *Roll.* 136. *Semb.* otherwise it will not appear whether it was within the jurisdiction. 1 *Sal.* 293.

[A writ of *significavit* is good.]

[If the cause is sufficient, tho' set out only generally, not specially.]

[If it says the offender *officiated*, without *where*; for officiate implies in public.]

[Tho' it does not say the offender has officiated since the monition.]

[Tho' it does not say he officiated at the time of the excommunication in the diocese of *L.*]

[Tho' it does not say the excommunication was pronounced by a person in holy orders, if it says he was lawfully authorized.]

[Tho' it does not say *when* the excommunication was pronounced.]

[A clergyman of the church of *England* acting contrary to the rules and discipline thereof, may be excommunicated, notwithstanding the toleration-act. *Trebeck v. Keith*, *H.* 1742, 2 *Atkyns*, 498.]

(B 4.)



## (B 4.) How the Writ shall be executed.

If the party be taken upon the *excommunicato capiendo*, he shall be committed to prison.

And the sheriff shall return his writ; but by the *stat. 5 El. 23.* he need not bring the body into court.

If the sheriff returns *non est inventus*, by the *stat. 5 El. 23.* there shall go a *capias* with proclamation, on which the sheriff shall make proclamation 10 days before the return, at the county court, assises, or quarter sessions, that the party in six days render himself, and if he doth not he shall forfeit 10*l.*

And after that shall go a second *capias* with proclamation, and thereon 20*l.* penalty, and so a third, and *in infinitum*, each with 20*l.* penalty; and if the party be taken, he shall be committed without bail, as on an *excommunicato capiendo*.

If a person after his commitment escapes, and the sheriff has not returned his writ, a *capias excommunicatum de novo* shall go. *Mod. Ca. 78.*

Otherwise, if the writ be returned. *Ibid.*

Or, if after commitment upon the former writ, he be removed by *habeas corpus*. *Dub. Mod. Ca. 78.*

But by the *stat. 5 El. 23.* a person in prison out of the realm, within age, *non-fane* or *feme-covert*, shall not incur the said penalties.

Nor, any who in the writ of *excommunicato capiendo* shall not have the addition required by the *stat. 1 H. 5. 5.*

Nor, if in the *significavit* it be not contained that the excommunication was for contempt in some original matter of heresy, refusal to baptize his child, to receive the communion, to come to church, or in some error of religion or doctrine, incontinency, usury, simony, perjury in the ecclesiastical court, or idolatry.

And therefore, if a *capias* with proclamation goes against any in prison, within age, &c. when taken upon it, he may plead such matter in discharge of the penalties given by the *stat. 5 El. 23.*

So, if he has not a proper addition. *Sbo. 16. Jon. 226.*

So, if the *significavit* to Chancery does not shew that the excommunication was for one of the causes contained in the statute. *Cro. Car. 197. 199. 2 Jon. 89. R. 1 Rol. 174. R. 12 Co. 77.*

So, if the writ of *excommunicato capiendo* was not delivered upon record. *Semb. 1 Sid. 165. R. 1 Sid. 285. 1 Vent. 309. 338.*

So, if the party comes upon a *habeas corpus*, and it appears that the writ of *excommunicato capiendo* does not shew good cause for excommunication; *B. R.* since the *stat. 5 El.* may quash the writ, or award a *superfedeas*. *R. 1 Sal. 293, 294.*

[It may be superseded after it is recorded and delivered out, and before the return. *Rex v. Theed, H. 3 G. Str. 43.*]

So, if the cause be uncertain; as, in a cause *substractionis decimarum, sive aliorum jurium ecclesiasticorum*; for perhaps the *alia jura* were not within the jurisdiction of the court. *R. 1 Sal. 293.*

[*Significavit*, in a cause for subtraction of tithes, and other ecclesiastical duties, is good; if in the disjunctive, or other, &c. it is bad for uncertainty. *Rex v. Turfoot, M. 10 G. 2. B. R. H. 314.*]

In quodam negotio *instructionis puerorum sine licentia*, without saying in what he instructed them. *R. 1 Sal. 294.*

[If it is in a writ *pro correctione morum*, it is too general. *R. v. Theed*, H. 3 G. Str. 43.]

[Or, for not appearing to answer *certis articulis animæ suæ salutem, morumque correctionem concernentibus*. *Rex v. Munnerly*, H. 4 G. Str. 76.]

[If the *significavit* is concerning a matter merely spiritual, it is not sufficient, and shall be quashed. *Rex v. Eyre*, M. 10 G. 2. Str. 1067.]

[If the writ is *causa defamationis sive convicii*, it shall be quashed as uncertain. *Rex v. Smith*, H. 6 G. 2. Str. 946.]

[But not for slander or defamation; for that is not uncertain. *Rex v. Keat*, T. 6 G. 2. Str. 950.]

[The writ stated, that the defendant was excommunicated in a cause of "defamation and slander merely spiritual;" and it was holden sufficient. *Rex v. Payton*, H. 37 G. 3. 7 T. R. 153.]

Yet the writ of *excommunicato capiendo* stands in force, tho' the penalties are discharged for want of the addition. *Semb. Sho.* 16. R. 2 Jon. 89. *Semb. cont.* 1 Sal. 294, 5. R. Jon. 226.

Or, for that the *significavit* does not contain any of the causes required by the statute. *Semb. Cro. Car.* 197. *Adm. Cro. Car.* 199. R. 2 Jon. 89. R. 3 Mod. 89. R. Latch, 204. R. 1 Sal. 294.

So, an *excommunicato capiendo* lies now by the common law, for causes not mentioned in the *stat.* 5 El. 23. *Per Wyndham*, 1 Sid. 181.

So, if an *excommunicato capiendo* be awarded according to the statute for a cause not mentioned there, the party shall not be discharged on motion, or suggestion, without a *habeas corpus* returned, and plea to it. R. 1 Sid. 181. Latch, 174. R. 1 Sal. 294.

So, he shall not be discharged for a misnomer; for he has no day to plead, and may have false imprisonment if he be not named in the writ. R. 1 Mod. 70.

[If the writ, in reciting the *significavit*, omits the *nominative case*, i. e. the name of the person excommunicated, yet the court will not quash it; for most of the writs are so. *Rex v. Clarke*, H. 6 G. Str. 265.]

So, if several are named in the *significavit*, and at the end of the names it be added, *of the parish of A. in the county of B.*, this addition goes to each of them. R. 3 Mod. 42, 3.

So, if the *significavit* mentions an excommunication for not coming to his parish-church, it is sufficient; tho' the statute says, generally, *come to church*; for he might plead it, if he was at another church. *Ibid.*

So, he cannot plead or move to quash the writ before the return. R. 1 Sal. 294.

[If the writ commands the sheriff to hold two defendants "till they have made satisfaction," so that if one alone made satisfaction, she could not be discharged; the writ shall be quashed. *Rex v. Caper*, P. 11 G. 2. Andr. 220.]

[The defendant shall not be deprived of the benefit of the rules. *Rex v. Buckland*, H. 7 G. Str. 413.]

[If the sentence of the greater excommunication, instead of the less, be pronounced, it is a ground of appeal only, and the court of B. R. will not quash the writ for that objection. *Rex v. Payton*, H. 37 G. 3. 7 T. R. 153.]

(B 5.)

(B 5.) How discharged.

If the party excommunicated makes satisfaction to holy church for his contempt, and the bishop, &c. certifies to the *Chancery*, a writ goes to the sheriff for his discharge. *F. N. B. 63. A.*

And upon that an *alias* and *pluries*; and if the sheriff does nothing, an attachment against him returnable in *B. R.* *F. N. B. 63. B.*

So, if he gives caution to the bishop to obey, &c. and this be certified to the *Chancery*. *F. N. B. 64. A.*

So, if the excommunication was pronounced and certified after a prohibition sued, and an attachment upon it, the party may shew it to the court, and shall have a *superfedeas* out of *Chancery*. *F. N. B. 64. D.*

Or, if the attachment was returned, he shall have it out of *B. R.* *Ibid.*

So, upon a certificate by the official, that the excommunicate has appealed. *F. N. B. 64. E. 1 Ver. 24.*

Or, after appeal, he may sue out a *scire facias* against the bishop and the party at whose suit he was excommunicated, and at the return of the *scire facias*, if it be not denied, he shall have a *superfedeas*. *F. N. B. 65. E.*

And if the matter cannot be determined at the day of the return, it shall be adjourned, and in the mean time he shall have a special *superfedeas*. *Ibid.*

So, if the bishop certifies that he has commanded the official to absolve him, he may thereupon have a writ for his discharge when absolved. *F. N. B. 63. F.*

And upon that an *alias* and *pluries*; and if the sheriff does not regard them, an attachment against him. *Ibid.*

Upon which writes the sheriff ought to inform himself, as well as he can, whether he be absolved; for the official is not bound to certify him thereof. *F. N. B. 63. G.*

So, if the *excommunicato capiendo* appears to have been granted without good cause, it may be superseded by *Chancery* at the common law; and now, since the *stat. 5 El. by B. R. 1 Sal. 293. Semb. cont. 1 Ver. 24.*

But if the bishop refuses to take caution or surety to obey the holy church, the excommunicate shall have a writ *de cautione admittendâ*, by which the bishop shall be commanded to take caution, and to command the sheriff to deliver him. *F. N. B. 63. C.*

And if the bishop refuses, he shall have a writ to the sheriff, *quod accedat ad episcopum, & moneat ut acceptâ cautione mandet deliberari, & si idem episcopus noluerit, &c.* then the sheriff shall deliver him. *F. N. B. 63. D.*

And thereupon he shall have an *alias* and *pluries*; and if the sheriff neglects, an attachment against him. *F. N. B. 63. E.*

So, if the excommunication be contrary to the law of the realm, so that he cannot have a writ *de cautione admittenda*, (for then he would be bound *parare mandatis ecclesiæ*;) he shall have a writ to the bishop out of *Chancery*, to absolve him; as, where the cause was out of the cognizance of the spiritual court, and it so appears upon the libel. *R. 12 Co. 76.*

So, if the cause, upon which he was excommunicated, be pardoned. *Ibid.* And



## EXCOMMENCEMENT.

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And this, tho' the party be taken by a writ of *excommunicato capi-endo*. R. 12 Co. 76.

Or, in such case, if the bishop, upon shewing that he was excommunicated for a matter pardoned, or out of the cognizance of the spiritual court, &c. and upon request, refuses to absolve him, an action upon the case lies against the bishop. R. 12 Co. 77.

But if the excommunication was in a cause, which appears by the libel to be sued out of the diocese; there shall not be a writ out of *Chancery* to the bishop to absolve him, but the writ *de cautione admittenda* is sufficient; for tho' the *stat.* 23 H. 8. 9. disallows a suit out of the diocese, yet there are many cases in which it may be so. R. 12 Co. 77.

### (C) Absolution.

**A**bsolution ought to be by the same bishop who excommunicated, or by him to whom the cause is removed by appeal. R. Mo. 775.

But, if a man be twice excommunicated, and absolved upon the first stands in force. R. Mo. 849.

## EXCUSE.

*Vide Exoine—Pleader*, (E 15.—F 18.—3 O 15, &c.)—*Return*, (D 1, &c.)

## EXECUTION.

### (A) Executions in Actions Real.

#### (A 1.) By Entry.

**E**XECUTION is *finis & effectus legis*.

After judgment in a real action, if the estate continues in the possession of the tenant against whom the recovery was, the demandant may enter, when the writ shews the certainty of the thing recovered, before seisin delivered upon an *habere facias seisinam*. Co. L. 34. b.

And he may enter within or after the year after judgment. 1 Rol. 885. l. 10.

So, if a recovery be of a rent, common, &c. in certainty, the demandant, after judgment, may distrain before seisin by an *habere facias seisinam*. Co. L. 34. b.

So, if the tenant dies before execution, the demandant may enter upon his heir. 1 Rol. 884. l. 47.

So, tho' there are several descents. 1 Rol. 884. l. 52. *Vide post*. (A 5.)

So, if before execution a stranger enters and dies seised, the demandant may enter within a year after judgment. 1 Rol. 885. l. 2.

So, if judgment be against tenant in tail, the demandant may enter upon the issue in tail. 1 Rol. 884. l. 50. *Vide post*. (A 2.)

So, if a writ of error be brought against the heir, and judgment reversed,

versed, the demandant in error may enter upon him, tho' he be in by descent. 1 *Rol.* 884. l. 42.

But the demandant cannot enter upon a stranger after the year. 1 *Rol.* 885. l. 12.

Or, after a descent cast. 1 *Rol.* 885. l. 15.

(A 2.) By *Habere facias Seisinam*.

An *habere facias seisinam* is a judicial writ issuing out of the record of the judgment, and directed to the sheriff of the county where the land lies, commanding him *quod habere faciat* to the demandant *seisinam suam de messuagio*, &c.

In a real action, after judgment *quod recuperet seisinam*, the demandant may take out execution by *habere facias seisinam* at any time within a year and a day after judgment.

And where the certainty does not appear by writ, he cannot enter; but shall have an *habere facias seisinam*; as, in dower. *Co. L.* 34. b.

So, tho' the delivery of seisin by the sheriff does not reduce it to a certainty; as, if in dower, a woman recovers the third part of a moiety. *Co. L.* 34. b.

If the tenant dies after judgment, execution may be sued against his heir.

So, against the issue in tail, where the recovery is upon a real title.

So, where a recovery is against tenant in tail by common recovery; for the issue shall have the recompence in value. *Co. L.* 361. b. *R. Dy.* 376. b. *R.* 1 *Co.* 94. b. 106. a. *Vide Estates*, (B 27.)

But if a recovery be against tenant in tail upon a false title, who dies before execution; in a *scire facias* against the issue in tail, he may avoid it. *Co. L.* 361. b.

(A 3.) *How it shall be done.*] If the writ be, that the sheriff *habere facias seisinam* of several messuages in the possession of the same person, it is sufficient that he does execution in one in the name of all, without going to each particular. *R.* 1 *Rol.* 886. l. 32.

If a recovery be of a rent, common, &c. it is sufficient that the sheriff, upon the land, delivers seisin of the rent, common, &c. by *parol*; for thereby the demandant is in actual possession. 1 *Rol.* 886. l. 52.

So, if the sheriff offers to deliver seisin, and shews the parcels in which, it is sufficient, tho' the demandant refuses it; for his entry afterwards is *congeable*. *Semb. Dy.* 278. b.

But where the houses, &c. recovered are in the possession of several, it is not sufficient to deliver seisin of one in the name of all; but he ought to go to each, particularly. *R.* 1 *Rol.* 886. l. 40.

If a writ be for seisin in 20 acres, he ought to deliver the acres, as computed by the country; not 20 measured according to the statute. *R.* 1 *Rol.* 886. l. 50.

If the demandant has once had execution, he cannot afterwards have execution again. *Vide post.* (A 6.)

And therefore, where the sheriff had returned upon an *habere facias seisinam*, execution done, an *alias habere facias seisinam* never was seen. *Dy.* 278. b.

And if execution be done, the court will compel the sheriff to return the writ. *R.* 1 *Rol.* 77.

So,

So, if a fee be executed by the ancestor, it never shall be executed again by the heir. 1 *Rol.* 886. l. 18.

Or, if a fee tail, it shall not be executed again by the issue in tail. 1 *Rol.* 886. l. 20.

So, if husband and wife be tenants for life, remainder to them in tail, the husband dies, and the wife has execution; the issue shall not have execution again, tho' he claims as heir to both; for he claims the same estate. 1 *Rol.* 886. l. 15. *Vide post.* (A 5.)

(A 4.) By *Scire Facias*.

If the demandant sues execution after a year after judgment, he must have a *scire facias*. 2 *Inst.* 469. *Vide post.* (I 4.)—*Pleader*, (3 L 1, 2.)

(A 5.) By *Habere facias Possessionem*.

If there be judgment in ejectment, &c. where only a term for years is recovered, execution shall be by an *habere facias possessionem*.

It may be sued after a year after judgment in ejectment, *quoad* the land without a *scire facias*. R. 1 *Sid.* 351. R. *cont. Sal.* 258. 600. *Vide post.* (I 4.)

If the defendant dies before execution, it may be done against his heir; for, in ejectment, the ejector by intendment is a disseisor. R. 1 *Rol.* 887. l. 10. *Vide ante*, (A 1.)

So, it may be sued at any time before the term expires. *Semb. Skin.* 427.

[If teste'd before lessor of plaintiff's death, tho' not sued out till after it, it is regular. *Doe v. Roe*, M. 7 G. 3. 4 B. M. 1970.]

If the plaintiff in ejectment declare for 40 acres, and recovers only 30, the sheriff may deliver to him possession of two or three acres in the name of all, without setting them out by metes and bounds, tho' the plaintiff recovered only part of what he supposed in the possession of the tenant. R. 1 *Rol.* 886. l. 45. *Vide ante*, (A 3.)

[If on judgment in ejectment for five-eighths of a cottage sheriff gives possession of the whole, the court will make a rule on sheriff and lessor of plaintiff, to restore possession of three-eighths to tenant. *Roe v. Dawson*, H. 10 G. 3. 3 *Wils.* 49.]

The sheriff upon an *habere facias seisinam*, or *possessionem*, may break open a house to deliver seisin, or possession of it to the demandant, or plaintiff. R. 5 *Co.* 91. b.

May remove all persons in the house. R. 1 *Leo.* 145.

And ought so to do. 1 *Leo.* 145.

If an *habere facias possessionem* be executed, and before the return and filing the defendant re-enters, a new *habere facias possessionem* shall issue. 2 *Brownl.* 253. *Mod. Ca.* 97. R. 1 *Sal.* 321. *Semb.* 1 *Leo.* 145. R. 1 *Rol.* 353.

If he re-enters after the writ executed, returned, and filed, an attachment upon an *affidavit* shall go against him. 2 *Brownl.* 253. *Dub.* if the execution was complete. *Mod. Ca.* 27. 1 *Sal.* 321.

But till possession completely given, and the bailiffs withdrawn, the execution is not complete; and upon disturbance an attachment goes. *Mod. Ca.* 27. 1 *Sal.* 321. 1 *Leo.* 145.

[If immediately after the writ is executed the tenant in possession



attorns to another, the court will grant a new writ; but not where possession has continued as delivered for a month. *Goodright v. Hart*, P. 2 G. 2. Str. 830.]

(A 6.) Execution upon a Fine, and Common Recovery.

A fine *sur conusance de droit come ceo*, &c. is executed, and needs not any execution. 1 Rol. 885. l. 20. 887. l. 15. *Vide Fine*, (E 9.) *Vide Fine*, (E 15.)—*Pleader*, (3 A 7.)

All other fines are executory, and must be executed. *Vide Fine*, (E 10, &c.)

So, a fine *come ceo*, &c. to A. in tail, remainder over, may be afterwards executed, as to the remainder. 1 Rol. 887. l. 20. Dy. 69.

So, if a fine be executed as to a particular estate, it may afterwards be executed as to the remainder. 1 Rol. 885. l. 40.

Tho' the remainder be to him who has the particular estate. 1 Rol. 886. l. 5.

Yet, if a fine be executed, there shall not be another execution; and therefore, if a fine be to A., remainder to his right heirs; this is executed for the whole, and his son shall not have execution after his death. 1 Rol. 885. l. 32. *Vide ante*, (A 3.)

If it be to A. for life, remainder to B. in tail, remainder to A. in fee, and A. surrenders to B. who dies without issue, and then A. enters; his heir shall not have execution for the remainder in fee; for it was executed. 1 Rol. 885. l. 35.

If a remainder be limited by fine to husband and wife, and the heirs of their bodies, and one dies, then the particular estate determines, and the survivor enters; the issue shall not have execution afterwards, tho' he claims as heir of both bodies. 1 Rol. 885. l. 25.

If, to husband and wife, and the heirs of the husband, who survives; his heir shall not have execution. 1 Rol. 885. l. 50.

If a fine be executed by entry or *scire facias*, the execution extends only to the estate in possession, and not to the remainder.

Tho' the last remainder be to him who has the possession: as, if a fine be to A. in tail, remainder over to others for life, remainder to A. in fee, and the remainders for life cease, whereby A. has the tail and the fee together; if he sues execution, he can sue it only for the tail. 1 Rol. 886. l. 25.

But, if the fine or estate be avoided before execution, it shall never be executed: as, if tenant in tail takes a fine of A. and thereby renders to B. for life, in tail, or in fee, and dies before proclamations passed, or entry of the conusee; whereupon the issue enters; the conusee shall not have a *scire facias* against the issue to execute the fine, tho' the proclamations afterwards pass. Pl. Com. 437. b.

(B) Execution by the King.

(B 1.) By *Capias pro Fine*, or *Capias Utlagatum*.

WHEN judgment is given that the plaintiff or defendant *capiatur*, &c. a *capias pro fine* lies for the fine due to the king. *Vide Information*, (D 7.) *Vide post*. (B 2.)

For *Capias Utlagatum*, *vide Utlagary*. *Vide post*. (B 2.)

(B 2.)

(B 2.) When any in Execution for the King shall also be so for the Party.

If a man be taken by a *capias pro fine* within a year, and a *capias* lies in the same action for the plaintiff, the party taken upon the *capias pro fine*, shall be also in execution for the plaintiff, if he pleases, without his prayer. 5 Co. 88. b. 1 Rol. 895. l. 50. Bridg. 7. 14 H. 7. 15.

So, if a *capias* does not lie for the plaintiff in the same action, but only a *feri facias*, &c. yet upon his prayer, the party taken upon the *capias pro fine* shall remain in execution for the plaintiff. 5 Co. 88. b. Bridg. 7.

So, if he be not taken upon a *capias pro fine* till after the year when the plaintiff is put to a *scire facias*. 5 Co. 88. b.

And in such case he shall be in execution for the plaintiff, before that he be for the king. 2 Rol. 158. l. 7.

And tho' the fine and process thereon be pardoned. 1 Leo. 51. Bridg. 7.

But where the party is not taken upon a *capias pro fine* within the year, or a *capias* does not lie in the same action for the plaintiff; the party shall not be in execution for him, without prayer. 5 Co. 88. b.

Or, if one only be taken, where the judgment was joint against many. 1 Rol. 896. l. 2.

So, if taken upon a *capias pro fine*, where the plaintiff takes execution by *elegit*. 1 Leo. 51.

So, if the defendant be taken upon a *capias utlagatum*, after judgment, within the year; he shall be in execution for the plaintiff, if he will, without prayer. R. 5 Co. 88. a. Mo. 566. Yel. 20. 1 Rol. 895. l. 20. Bridg. 7.

Tho' his body never was brought into court, or committed in execution for the plaintiff. R. 5 Co. 88. b.

Tho' by the common law, no *capias* lies for the plaintiff, if no laches be in him in the continuance of his process; for, as the king has benefit by his suit, he shall have advantage by the king's suit. R. 5 Co. 88. a.

So, if he be taken upon a *capias utlagatum* after the year, the plaintiff prays that he may be in execution for him; it shall be so. Adm. 5 Co. 89. b.

So, if taken upon a *capias utlagatum* out of B. R., where judgment was affirmed upon error. Cro. El. 706.

But a party taken upon a *capias utlagatum* shall not be in execution for the plaintiff, unless he so pleases. Per two J. Garwy cont. Cro. El. 850. R. 1 Rol. 895. l. 30.

Or, if taken after the year, he shall not be so, without the prayer of the plaintiff. Adm. 5 Co. 89. b. Semb. cont. Cro. El. 706. Dub. 1 Rol. 895. l. 25.

### (B 3.) Execution for a Debt to the King.

(B 3.) To what thing it extends.] How a man becomes indebted to the king, vide Dett, (G 1. 9.)

By the *stat. 33 H. 8. 39.* all obligations and specialties for any cause concerning the king shall be taken *domino regi*; and shall be of the same force and effect as a statute staple.

And all process, judgments, executions on the same shall be of the same effect against all bound, their heirs, successors, executors, and administrators, and no other, as on a statute staple.

By the common law, before that statute, the king had power to take execution against the body, the land, and the goods of his debtor; or accountant to him. 3 Co. 12. b. *Vide Dett*, (G 2, &c.)

In the hands of the heir, or of a stranger. *Vide Dett*, (G 5, 6.)

And the king shall be preferred before a subject, for his debt. *Vide Dett*, (G 8.)

But by the *st. M. Ch. 8. nos non seisiemus terram aliquam, aut redditum, pro debito nostro quamdiu catalla debitoris sufficiunt, aut ipse paratus sit satisfacere.*

And therefore, if the goods of the king's debtor appear sufficient, the sheriff ought not to extend his lands in the hand of him, his heir, purchaser, or terre-tenant. 2 *Inst.* 19.

And if the executor or heir has assets, by the course of the *Exchequer*, process does not go against the purchaser. *Dy. 67. b. in marg.*

(B 4.) By what process done. By *extendi facias*.] Since the *st. 33 H. 8. 39.* the usual process for the king's debt is an *extendi facias*; whereby the sheriff is commanded *quod per sacramentum, &c. inquirat quæ & cujusmodi bona & cujus pretii habuit, &c. & si bona, &c. non sufficiere, &c. tunc per sacramentum inquirat quæ terras & tenementa & cujus valoris, &c. & ea extendi faciat, &c. & capiat prædictum debitorem, &c.* 2 *Inst.* 19. *Vide post.* (C 14.) *Vide Statute Staple*, (D 5.)

By the same statute, suits in the several courts for the king's debts shall be under the seal of the several courts, by *capias, extendi facias, subpæna*, attachment, and proclamation, if need be, or otherwise as to the said courts shall be thought expedient for the recovery of the king's debts.

[A judgment recovered by a subject, tho' not completely executed, shall be preferred to the king's extent, sued out posterior to the judgment. 2 *Bl. Rep.* 1294. *et vid. st. 33 H. 8. c. 39. s. 74.*]

[So, if an assignment be made of a bankrupt's effects, before the issuing of the extent, they are protected against it. *Vid. Doug.* 415.]

[On execution of an extent a person must answer all questions tho' affecting his interest, if they do not subject him to penalties or forfeiture; or attachment issues. *R. v. Newel, H. 6 Ann. Parker*, 269.]

[If persons do not attend execution of extent, a new one shall be ordered, and they to attend; and they may be charged with costs. *R. v. Wood, M. 7 Ann. Parker*, 271.]

[Tho' a *scire facias* has issued on a bond, yet an immediate extent may afterwards issue, and the king may proceed on one, or on both. *Rex v. Blundell, in Sc. P.* 1721, *Bunb.* 74.]

[On *scire feci* returned to *scire facias*, and rules given, if defendant does not appear and plead, extent may issue without judgment previous thereto; or judgment for the king may be entered. *R. v. Donithorne, H. 23 G. 2. Parker*, 94.]

[On a bond from a man, as security for another to whom the crown's money is entrusted, a *scire facias* shall issue. *Rex v. Yale, in Sc. H.* 1719, *Bunb.* 58.]

[On



[On a dormant extent (tho' an inquisition has been taken) no process shall issue without motion. *Rex v. Robinson, in Sc. P. 1720, Bunb. 62.*]

[A stranger has a right to prove his property in goods taken by extent, on taking the inquisition, without being put to plead; and if refused, and the extent and inquisition returned, they shall be superseded, and a new extent of the same date issue. *Bulley v. Blommart, 7. 1727, Bunb. 233.*]

(B 5.) *What lands, &c. shall be extended.* After inquisition taken, all lands and tenements found in the seisin of the debtor are to be extended by the sheriff. *Vide post. (C 14.)*

So, a term for years also may be extended. *Qu.* If it ought not to be sold? *Lane, 50.*

[The court will not order lands seized under an extent to be excepted out of an extent to issue on a subsequent judgment. *R. v. Jones, H. 17 G. 2. Parker, 52.*]

If goods are seized upon an execution for the king's debt, they ought to be appraised before sale. *Mad. 670.*

[If on an extent, an inquisition is taken, and a term found, and defendant plead to it, and it is found for the crown; there shall not be a *venditioni exponas*, but an injunction shall issue to put the crown in possession. *Rex v. Rawlins, in Sc. H. 1720, Bunb. 71.*]

If the king has judgment in a *scire facias* upon a recognizance for surety of the peace, he may have execution against the body, as well as the land of the party. *1 Rol. 897. l. 20.*

If a man pleads a title by extent, he ought to shew when it issued, out of what court, and whether it was upon inquisition. *2 Rol. 11.*

### (C) Execution for a Common Person; in Personal Actions.

(C 1.) What, by the Common Law.

BY the common law, execution upon a judgment or recognizance for a common person was generally by *levari facias*, commanding the sheriff, *quod levare faciat de terris & catallis, &c.* the debt. *3 Co. 12. a. 2 Inst. 394.*

Or, by *fieri facias*, commanding the sheriff, *quod fieri faciat de bonis & catallis, &c.* *3 Co. 12. a.*

So, in actions *vi & armis*, execution might be made by a *capias ad satisfaciendum*. *3 Co. 12. a. Vide post. (C 9.)*

So, in an action against an heir, upon an obligation or other lien of his ancestor, execution would be against the lands and tenements which the heir had by descent. *3 Co. 12. b. Vide Affets.*

(C 2.) What not.

But, by the common law, execution never was against the lands or tenements of the party at the suit of a common person, except in the case of an heir. *R. 3 Co. 11. b. &c. 1 Inst. 394.*

Nor, against the body of the defendant, except where he was charged with force by an action *vi & armis*. *3 Co. 11. b. 12. a.*

## What by Statute.

By the *ſt. W. 2. 18.* it may be by *elegit* to the ſheriff to extend and deliver to the plaintiff all the goods of the party, (beaſts of the plough excepted,) and one moiety of his lands. *Vide poſt. (C 14.)*

Or, by the *ſt. 11 E. 1.* on a ſtatute-merchant execution may be againſt the body, if the goods, &c. are not ſufficient.

And, by the *ſt. W. 2. 11.* againſt the body in account.

And, by the *ſt. 25 Edw. 3. ſt. 5. c. 17.* in debt.

## (C 3.) Execution againſt Goods and Chattels.

(C 3.) By *levari facias*.] By the *levari facias* the ſheriff may levy the debt of all the goods and chattels of the defendant. *Vide Proceſs, (E 4.)*

So, he may take the *emblements*, and all preſent profits of his land. *3 Co. 11. b.*

So, the rents. *Pl. Com. 441. a.*

So, goods attached (where by cuſtom goods at the commencement of the ſuit may be attached to anſwer to the plaintiff if he recovers) may be taken in execution, ſubject to the attachment. *R. 1 Rol. 893. l. 40.*

But upon a *levari facias* the ſheriff cannot take the defendant's lands to deliver in execution; tho' the writ ſays, *de terris & catallis*. *Pl. Com. 441. a.*

[*Levari* lies not for a ſee-farm rent, the remedy is by diſtreſs. *Lupton v. Barker, P. 1741, Bunb. 348.*]

(C 4.) By *fieri facias*. *What things may be taken.*] So, by a *fieri facias* the ſheriff may take all goods and chattels of the defendant, which he may take upon the *levari facias*; for the *fieri facias* includes the *levari facias*. *2 Inſt. 391. Vide Proceſs, (E 5. 7.)*

So, he may take and ſell an annuity of 40 *l. per annum* granted by the king, for years, to be paid by the receiver of the court; for it is in the nature of a rent-charge. *R. 2 Cro. 79.*

So, he may extend or ſell a term for years. *8 Co. 171. a.*

[But the ſheriff has not any authority to ſell an eſtate for life, being a freehold. *Dalt. Sher. 145.*]

[An eſtate *pur auter vie* may be ſold ſince the *ſtat. 29 Car. 2. c. 3. ſ. 12. Comb. 291.*]

So, he may cut down and ſell corn growing on the land; for the leſſee has an intereſt in it. *1 Sal. 368.*

So, utenſils for trade erected by the defendant, tho' fixed to the land; as, coppers, fats, pavements, &c. *R. 1 Sal. 368. Vide infra.*

And after ſale the defendant ſhall not have his term again, tho' the plaintiff be ſatiſfied his debt by the profits. *R. Mo. 873.*

So, if goods are taken in execution at the ſuit of *B.*, and the ſheriff returns *nulla bona*, they ſhall be afterwards taken at the ſuit of *C.*; for the property is not veſted in *B.*, nor in the ſheriff. *2 Ver. 238.*

But the ſheriff upon a *fieri facias* cannot take things fixed to the freehold, as doors, windows, &c. *Vide Biens (B).*

Nor, furnaces, coppers, &c. fixed. *Dub. 1 Rol. 891. l. 50. R. cont. 1 Sal. 368.* if erected by the defendant for the uſe of his trade. *Vide ſupra.*

Nor,

Nor, hearths, chimney-pieces, &c. put up by the defendant for the use of the house, and not for his trade. *R. 1 Sal. 368.*

So, the sheriff cannot take goods in pledge.

Or, demised to another. *Dy. 67. b. in marg.*

Nor, goods taken, and in custody of the sheriff, upon a former execution. *R. Sho. 173. R. 3 Mod. 236.*

So, he cannot take the goods of a stranger; for he is to take the goods of the party only, at his peril.

[And if a bailiff, on a *fi. fa.* against the goods of *A.*, take those of *B.*, an action of trespass lies against the sheriff. *Doug. 40.*]

[But where there is a doubt respecting the property of the goods, the safest way is for the sheriff to inquire by a jury in whom the property is. *Dalt. Sher. 146. Gilb. Ex. 21. 4 T. R. 633. 648.*]

[And the court of *B. R.* will not set aside the inquisition of a jury summoned for that purpose. *Roberts v. Thomas, B. R. M. 35 G. 3. 6 T. R. 88*]

[But such an inquisition is not admissible evidence in an action brought against the sheriff by the person in whom the property of the goods was found. *Latkow v. Eamer, C. P. H. 35 Geo. 3. 2 H. Bl. 437.*]

And if there are joint partners, and execution against one; the sheriff can take only his share. *R. Sho. 174.* can sell only his part, tho' he ought to seize the whole. *R. 1 Sal. 392.*

[If, on an execution against one of two partners, the partnership effects be taken and sold, the court will order the sheriff to pay over to the other a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master. *Doug. 650.*

So, if execution be upon a judgment against a corporation, he cannot take the goods of a member of the corporation, which he has in his natural capacity; but the goods of the corporation only. *1 Rol. 920. l. 50.*

[An execution against the goods of a bankrupt, taken out after his certificate is signed by his creditors, and before it is allowed by the chancellor, is valid. *1 T. R. 361.*]

[Nothing can be taken in execution, that cannot be sold; as, deeds, writings, &c. *Francis v. Nisb, T. 7 G. 2. B. R. H. 53.*]

[Bank-notes, &c. cannot be taken in execution. *Ibid.*]

[If the plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain, for his use, money which he has levied in an action at the suit of the defendant. *Doug. 231.*]

[Where two writs of *heri facias* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even tho' the seizure was first made under the subsequent execution. *1 T. R. 729.*]

[But where the sheriff has given a bill of sale to the person claiming under the second execution, this entitles the latter to have his debt, and the sheriff is liable to the plaintiff who delivered the first writ. *Id. 731. n.*]

[The effects acquired by an insolvent after his discharge under the *stat. 34 Geo. 3. c. 69.* are liable to be taken in execution for a debt due before. *Spalton v. Moorhouse, B. R. T. 35 G. 3. 6 T. R. 366.*]



[Goods are bound by the delivery of the writ; and therefore the sheriff may execute it, notwithstanding the death of the party afterwards, and before the return of it. *Eaton v. Southby*, C. P. T. 10 & 11 G. 2. *Willes*, 131. 7 *Mod.* 251. S. C.]

[If the owner of a ship charge her for repairs done in England by an instrument under seal, stated to be by way of bottomry, upon which she is afterwards seized by Admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but between the seizure and decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under the writ, nor can he maintain trover against the officer in possession by the warrant of the court of Admiralty. *Ladbroke v. Crickett*, B. R. M. 29 G. 3. 2 T. R. 649.]

[If A. lend money on the security of a ship, and take possession before execution executed at the suit of B., the vessel cannot be seized under B.'s execution. *Ibid.*]

(C 5.) *How the sheriff shall proceed upon it.*] After a *fiery facias* delivered to him, the sheriff may enter the house of the defendant, when the door is open, and seize the goods of the defendant there found. R. 5 Co. 92. a.

Or, the house of a stranger. *Semb.* 5 Co. 92. 2 Cro. 486. Cro. El. 759. 909. *Vide post.* (C 12.)

And this, by night or by day, if the door be open. *Semb.* 5 Co. 92. 2 Cro. 486.

But if it be the house of a stranger, he ought to aver that the goods were there. *Semb. Lut.* 1434.

If the house be open, and the sheriff enters, he may afterwards break an inner door to take the goods. R. Pal. 54.

And he need not aver that the goods were there. Pal. 54. [Note, This was the house of the defendant himself.]

So, if the goods of A. are conveyed into the house of B. to avoid an execution, the sheriff, upon a *fiery facias* against A., may break the house to make execution. R. 5 Co. 93. a.

So, if the sheriff, &c. enters, and takes goods in execution, and the party locks up and imprisons the bailiffs, &c. in the house; the sheriff may break the house to deliver the bailiffs. R. 2 Cro. 556. Pal. 53. 2 Rol. 137.

So, the sheriff may make sale of goods in execution, without any appraisement of them.

So, he may, tho' a *superfedeas* be delivered to him after the goods were seized into his hands. *Per two J. Mo.* 542.

If, upon sale by the sheriff, money remains in his hands beyond the debt, the sheriff may keep it till the defendant demands it, and need not deliver it to the defendant before request. R. Noy, 59.

But the sheriff cannot break a house to make execution upon goods, or body. R. 5 Co. 92. Cro. El. 909. Mo. 668. Yel. 28.

Neither can he open the door, tho' it be only latched.

Or knock, and when the door is a little opened, thrust in with violence. R. Hob. 62.

Nor, use a *capias utlagatum* to execute a *latitat.* R. Hob. 263.

Nor, take several different chattels, when one is sufficient for the debt. R. Noy, 59.

So,

So, the sheriff ought not to deliver goods taken in execution to the plaintiff himself; but ought by sale to levy the debt. *R. Cro. El.* 504.

So, he ought not to re-deliver them to the defendant, if he pays only part of the debt. *Semb. 2 Vent.* 94.

So, he cannot detain them till the money to be levied, and also the charge of keeping them, be paid; for tho' the sheriff may make immediate sale, and the keeping is in favour of the defendant, for which he ought to make amends, yet this should be by agreement, and not by detainer till satisfaction. *Semb. Lut.* 1446.

[Poundage, and other necessary charges, may be levied out of a penalty. *Barnes*, 198.]

[In actions on simple contracts, and judgment for a *debt certain*, the expences of levying must be paid by the plaintiff; so that, if the sheriff over-charge, the plaintiff is the party grieved under the 29 *El. c. 4.* which regulates sheriff's fees: but where the judgment is for a *penalty*, the defendant must pay the expences of levying, and is the party grieved, if the sheriff over-charge. 2 *T. R.* 157.]

[Nothing but the poundage can be taken by the sheriff under the 29 *El. c. 4.* for levying an execution. *Id.* 148.]

Yet, after the money levied, the sheriff may pay it to the plaintiff. *Dub. 3 Lev.* 204.

[After execution, tho' on judgment for a penalty, the court cannot refer to prothonotary, to examine into money due, and order restitution of surplus. *Barnes*, 204.]

(C 6.) *How he shall sell.*] When the sheriff has taken goods in execution, he may sell them, without other direction. *Mod. Ca.* 295.

Tho' his office be determined before the sale. *Mod. Ca.* 299. *R. 1 Rol.* 893. *l.* 50.

So, he may sell a term for years. 4 *Co.* 74.

And it is sufficient to recite, that the party was possessed *de termino diverforum annorum*, without shewing the commencement or end of the term. *R. 4 Co.* 74. *a.*

And if he mistakes the date of the term, if the bill of sale has general words, *viz. all the defendant's interest*, &c. it is sufficient. *R. 4 Co.* 74. *a.*

And a sale by the sheriff continues good, tho' the judgment be afterwards reversed. *R. 5 Co.* 90. *b.* *R. 2 Cro.* 246. for the money only shall be restored. *Ry. Dy.* 363. *a.* If the sale was to a stranger. *Yel.* 180. Otherwise, if the sale be upon an *elegit*. *Vide post* (C 14.)

[If defendant is in custody on a *ca. sa.* and a *fi. fa.* is taken out, the sheriff under that may seize a leasehold; and if after the return he sells it, tho' no continuance of the writ of execution, nor any writ of *venditioni exponas*, the purchaser gains a title; and this whether the *ca. sa.* and *fi. fa.* are in the same county or not. *Jeans v. Wilkins*, *H.* 1748, 1 *Vesey*, 195.]

But a sale of a term by the sheriff, who mistakes the date, &c. shall be void. *R. 4 Co.* 74.

(C 7.) *How he shall make the return.*] The sheriff need not return a writ of *fieri facias*. *Vide Return*, (F 1, &c.)

But

But if the sheriff returns *goods seized for the value of the debt*, he shall answer for such value to the plaintiff. *Mod. Ca. 299. 1 Sal. 323. R. 1 Sid. 407.*

[If sheriff levies money, and makes his return at the return of the writ, when defendant has not lain two months in prison, he must return *he has levied*, &c.; but if he does not make his return till after defendant has lain two months in prison, and thereby is become a bankrupt prior to the time of executing the execution, he must return *nulla bona*. *Cooper v. Chitty, M. 30 G. 2. 1 B. M. 20. Coppendale v. Bridgen, T. 32 & 33 G. 2. 2 B. M. 814.*]

[The court will order the sheriff to bring into court money levied by him on *fieri facias*. *Thompson v. Dempster, M. 9 G. 2. B. R. H. 180.*]

[The court refused to order the administrator of a bailiff (to whom an execution had been delivered) to pay over to the plaintiff the money which he had received after the plaintiff's death. *Want v. Swayne, C. P. M. 13 G. 2. Willes, 185.*]

Or, debt lies against him for the money. *Vide Dett, (A 1.)*

Tho' they be afterwards rescued from him; for he cannot return the *rescous*. *Mod. Ca. 296. 299. R. 2 Rol. 57.*

[Where a person, against whom a writ of *fi. fa.* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable therefrom, the sheriff may, notwithstanding, return *nulla bona*, if it appear that the memorial of such annuity was not registered according to the directions of the annuity act 17 G. 3. c. 26. because in that case the deed is absolutely void. 2 T. R. 603.]

[The court of B. R., upon the application of the sheriff, enlarged the time for his making a return, upon suggestion of a reasonable doubt whether the goods seized under the writ were not covered by an extent afterwards issued at the suit of the crown for malt duties under the 28 Geo. 3. c. 37. s. 21. for the purpose of inducing the plaintiff to go into the court of Exchequer, and there contest the question of right with the crown. *Wills v. Pickman, B. R. H. 37 Geo. 3. 7 T. R. 174.*]

(C 8.) *Venditioni exponas.*] If the sheriff returns, *remanent pro defectu emptorum*, the plaintiff shall have a *venditioni exponas*. 1 Sal. 323. 1 Sid. 407.

[No *venditioni exponas* ought to issue without motion. *Per Price B. Rex v. Reeve, in Sc. T. 1719, Bunb. 45.*]

If the former sheriff made such return, the new sheriff ought to make sale upon the *venditioni exponas*. 1 Rol. 894. l. 5. 4 Leo. 20.

Tho' the writ be to the new sheriff, that he cause the former sheriff to sell. R. 1 Rol. 894. l. 5. but *Semb.* that upon a *disfringas nuper vicecomitem quod venditioni exponat*, the old sheriff may sell. *Mod. Ca. 295. 299. 1 Sal. 323.*

There are two forms of the *disfringas nuper vicecomitem*; the one, that the old sheriff *shall sell, and bring the money into court*. *Mod. Ca. 295.*

The other, that *he sell, and deliver the money to the new sheriff*. *Mod. Ca. 295. 299. 1 Sal. 323. 2 Rol. 57.*

And both are compulsive, and do not give authority to sell. *Mod. Ca. 295.* For



For he cannot return upon a *distringas nuper vicecomitem, quod remanent pro defectu emptorum*. *Mod. Ca.* 296.

But if a *superfedeas* comes to the sheriff, he cannot afterwards sell without a *venditioni exponas*; for the sale shall be void. *R. 1 Rol.* 894. *l.* 10.

Yet, a *venditioni exponas* shall go for the sale of goods levied before the *superfedeas*. *Dy.* 99. *a.* *Yel.* 6. *R. Cro.* *El.* 597.

And he may sell before a *superfedeas*, tho' he be out of his office, without a *venditioni exponas*. *Per Holt, Mod. Ca.* 295.

If a sheriff levies money, but does not return his writ at all; the sale after a *venditioni exponas* to the new sheriff shall be good. *R. 1 Rol.* 893. *l.* 50.

If the sheriff levies money of the defendant to the value of the debt, the defendant shall be discharged against the plaintiff, tho' the money never comes to his hand. *Mod. Ca.* 297. 299. *R. 2 Rol.* 57.

And he may plead such matter for his discharge, in debt afterwards upon the judgment. *2 Lev.* 203.

[The court refused to grant an attachment against the sheriff, because he had returned, that part of the goods levied remained in his hands for want of purchasers. *Leader v. Danvers, C. P. M.* 39 *G.* 3. *1 Bos. & Pull.* 359.]

(C 9.) By *Capias ad Satisfaciendum*.

(C 9.) *When it lies.*] So, execution may be by *capias ad satisfaciendum* against the body of the defendant, in all cases where a *capias ad satisfaciendum* lies in process. *3 Co.* 12. *a.*

And therefore, in all actions *vi et armis*, as in trespass, &c.; for there a *capias* lies in process at the common law. *3 Co.* 12. *a.* *Vide ante, (C 2.)*

[If defendant omits to plead a misnomer, he may be taken in execution by the wrong name. *Crawford v. Satchwell, M.* 18 *G.* 2. *Str.* 1218.]

If the principal offers himself in discharge of the bail, and the plaintiff doth not accept him, yet he may afterwards have a *capias ad satisfaciendum* against him; for the refusal was not a discharge, but a forbearance. *1 Rol.* 898. *l.* 45.

So, at common law, the king may have execution by *capias*. *Vide ante, (B 3, &c.)*

So, by the course of the court, a *capias* lies upon a judgment against bail in a *scire facias* upon a recognizance in *B. R.* *Vide Bail, (R 11.)*

[If *ca. fa.* is made returnable wrong, (as in vacation-time,) yet the writ is not void; but only liable to be set aside on motion for irregularity. *Campbell v. Cumming, T.* 1 *G.* 3. *2 B. M.* 1187.]

But a *capias* does not lie against bail by recognizance in *C. B.*, or in an inferior court. *Vide Bail, (R 11.)*

Or, against bail in *B. R.* on a writ of error in the *Exchequer*. *Vide Bail, (R 11.)*

So, a *capias ad satisfaciendum* does not lie upon a recognizance in *Chancery*; for no *capias* is given on a *scire facias*, by any statute; and it does not lie by the common law. *R. 1 Rol.* 897. *l.* 30. *R. Dy.* 306. *a.* *Dub.* 2 *Bul.* 63.

So, a *capias* does not lie upon judgment against a garnishee in *debt*; for he is no party to the suit. 1 *Rol.* 896. l. 50.

So, if a woman recovers damages in dower, she shall not have execution by *capias ad satisfaciendum*; for no *capias* lies in process. 1 *Rol.* 898. l. 2.

So, in all cases, where a *capias* does not lie in process, no execution shall be by *capias ad satisfaciendum*; as, in an assise of nuisance. *Sho.* 74.

So, a *capias* did not lie against a prior, &c. in trespass, or other action. 1 *Rol.* 898. l. 20.

So, if the plaintiff sues a *scire facias* within the year, (tho' he need not,) he cannot afterwards have a *capias* before judgment in the *scire facias*. R. 1 *Rol.* 900. l. 25.

[C 10.] *When the defendant shall be in execution.*] If defendant renders himself, and afterwards brings error, and has a *superfedeas*, but does not thereupon find bail, the court, upon the prayer of the plaintiff, may commit in execution, tho' the record be removed. 1 *Rol.* 896. l. 10.

[A prisoner after judgment against him may, notwithstanding the allowance of a writ of error, be charged in execution. *Fisher v. M'Namara*, C. P. T. 38 Geo. 3. 1 *Bos. & Pull. Rep.* 292.]

So, if a man be arrested upon a *capias ad satisfaciendum*, he shall be in execution before the return of the writ. 1 *Rol.* 910. l. 30.

[The court will not set aside an execution sued out before, but executed after the allowance of a writ of error served on the sheriff and the party, if the plaintiff in error has not regularly put in bail; otherwise, if he has. 2 *T. R.* 44.]

If the defendant be in the custody of the sheriff, and another writ of *capias ad satisfaciendum* is delivered to the sheriff against him, he shall be in execution immediately upon the second writ, without actual arrest. R. 5 *Co.* 89.

[A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the *Fleet*, tho' he be not there by compulsion. 3 *T. R.* 392.]

So, if the defendant be in prison for a crime, by leave of the court, he may be charged in execution. *Ray.* 58. 1 *Sid.* 154.

And tho' he be charged without leave, which he ought not to be, yet he shall not be discharged. R. *Ray.* 58. 1 *Sid.* 90.

If the defendant be in prison before judgment, in the prison of the same court where the judgment is; the plaintiff may pray that he may be in execution, and a *committitur* shall be entered on the roll, and then he shall be in execution. 1 *Rol.* 895. l. 5.

Or, if he be in another prison, he shall be brought up by *habeas corpus*, and committed in execution. 1 *Rol.* 895. l. 40.

So, if there be judgment in a *scire facias* against him, and three or four years afterwards he is in prison for another cause, he may be brought into court by *habeas corpus*, and charged in execution. 1 *Rol.* 896. l. 5.

If a defendant be taken upon a *capias pro fine*, or a *capias utlagatum*, he shall be in execution for the party, if he will. *Vide ante*, (B 2.)

[Defendant discharged by *superfedeas* before judgment, may afterwards be taken in execution. *Barnes*, 376.] [The

[The court will not set aside a *testatum capias ad satisfaciendum* sued out without an original *capias* to warrant it, tho' a writ of error has been brought, if a *capias ad satisfaciendum* have been afterwards sued out, returned, and entred on the roll. *Milstead v. Coppard*, B. R. E. 33 Geo. 3. 5 T. R. 272.]

[The court has no power to discharge a defendant out of execution, on the ground of a commission of bankruptcy having since been sued out against him by the plaintiff. *M'Master v. Kell*, C. P. T. 38 Geo. 3. 1 Bos. & Pull. 302.]

[If a defendant be superseadeable for want of judgment being entred up, but not actually discharged, he cannot be detained in an action on the judgment. *Pierfon v. Goodwin*, C. P. M. 39 Geo. 3. 1 Bos. & Pull. 361.]

(C 11.) *When not.*] But, without prayer, or a *habeas corpus* and a *committitur* upon the roll, he shall not be in execution, tho' the judgment was in B. R., and the defendant at the same time was prisoner in the *Marshalsea* of the marshal for another cause. R. 1 Rol. 895. l. 5.

Or, if the judgment was in C. B., and he at the time was prisoner in the Fleet.

Tho' he was prisoner at the suit of the plaintiff, in the same action, for want of bail. R. 1 Rol. 894. l. 52.

Tho' the warden of the *Fleet* informs the chancellor, or C. B., that he is a prisoner there, and the court commands him to detain him till judgment satisfied. R. 1 Rol. 895. l. 15. 40. Dy. 306. a.

Tho' a *habeas corpus* be granted for him, and the warden returns, that he is *languidis*. 1 Rol. 894. l. 45.

Tho' a special writ be directed to the warden to detain him; for he ought to appear in court upon the *habeas corpus*, and shall be opposed, whether he be the same person. R. 1 Rol. 894. l. 40.

So, if a defendant be committed in execution upon a writ to the sheriff of *Middlesex*, he shall not afterwards be charged in execution upon another writ to the sheriffs of *London*; for they are different counties, and distinct prisons, tho' the same persons are sheriffs of both, and *Newgate* is the prison for both. R. 1 Rol. 894. l. 25.

So, if a defendant taken upon a *capias ad satisfaciendum* be brought into court by the sheriff, he shall not be committed in execution, if the plaintiff does not pray it. R. 1 And. 118.

And he shall be discharged out of the custody of the sheriff also, if the sheriff does not pray the contrary. 1 And. 118.

[Defendant discharged by *superseadeas* after judgment, may not afterwards be taken in execution. *Barnes*, 375, 376.]

[If the plaintiff recover a judgment against two defendants in B. R., and one of them bring a writ of error in *Cam. Scacc.* the plaintiff cannot charge the other defendant in execution, till the record be remitted into B. R., notwithstanding the writ of error might have been quashed immediately, because not brought by both defendants. 2 T. R. 737.]

[Where a *ca. fa.* is returnable against the principal on a particular day, before which a writ of error is allowed and served, that operates as a *superseadeas* to any proceeding against the bail, tho' the

*ca.*



*ca. fa.* has lain four days in the office, before the allowance of the writ of error. 3 *T. R.* 390.]

(C 12.) *An arrest, what shall be.*] If a bailiff, &c. puts his hand, &c. upon the party, saying, that he arrests him; it shall be a sufficient arrest, without shewing him the warrant, and without saying at whose suit he was arrested, if he does not ask it. *R. 2 Cro.* 485. *Semb. cont. 6 Co.* 54. 9 *Co.* 69. a.

So, tho' the bailiff has the warrant in his pocket. *R. 2 Cro.* 486.

Or, has two warrants in his pocket, and does not say upon which he arrests him; for he shall be arrested upon both. *R. 2 Cro.* 486.

So, if a bailiff gives a warrant to his servant, who, by his command and in his presence, puts his hand upon him, and says, *I arrest you.* *Dub. per Holt, Mod. Ca.* 211.

So, if a servant goes into another room out of the presence of the bailiff, who waits at the door, and there arrests him. *Dub. per Holt, Mod. Ca.* 211. [*Corrup.* 65.]

So, if the bailiff only touches him, and says, that he arrests him. 1 *Sal.* 79.

So, if *B.* be arrested, and in custody of the sheriff, upon a *mesne process*, and afterwards a *capias utlagatum* be delivered to the sheriff against *B.* without an actual arrest, he shall be in custody upon the *capias utlagatum*; and if he escapes, the declaration shall say, that he was arrested upon it. *R. 5 Co.* 89. a.

But, if the party requires it, he ought to shew the warrant, tell at whose suit, for what cause, by what process, and in what court returnable the arrest is made; otherwise it will be wrongful. *R. 6 Co.* 54. 9 *Co.* 69. a.

So, words only do not make an arrest; and therefore, if a bailiff says, *I arrest*, and does not touch him, tho' he be beat off by a sword or other weapon, it is no arrest. *R. 1 Sal.* 79.

[The officer cannot justify breaking open the window or outward door; but if once in the house, he may break open inward doors. *Foster*, 319, 320.]

[Only the occupier and his family, whose ordinary residence is there, have this privilege. The house of another is not the castle of a stranger. *Ibid.*]

The sheriff may enter the house of another where the party is, if the door be open, to make an arrest. *R. 2 Cro.* 486. *R. 5 Co.* 92. a. *Vide ante*, (C 5.)

Tho' it be at six o'clock at night. *R. 2 Cro.* 486.

So, upon an attachment against him, he may break the house to take him. *R. 1 Rol.* 336.

So, if a man arrested escapes into an house, he may break the house to retake him. *R. Pal.* 53.

So, if a window be open, and the bailiff arrest him at the window, and then the party escapes; the bailiff may break the house to take him. *R. Pal.* 53. 2 *Rol.* 138.

But upon information that his prisoner fled into the house of *B.* he cannot enter, and, upon denial of the keys of a chest, break it open, if he be not in the chest; for he takes it upon him at his peril. *R. 2 Rol.* 564. l. 15.

(C 13.)

(C13.) *When the defendant shall be discharged.*] If a man taken upon a *capias ad satisfaciendum* satisfies the debt, the sheriff may discharge him. *Dub. Cro. El.* 404. If the payment be to the sheriff. *Dub. 2 Lev.* 203.

So, if a *superfedeas* of the process comes to the sheriff.

So, if a *capias ad satisfaciendum* comes to the sheriff, and before an arrest upon it, the defendant pays the debt to the sheriff; he ought not to be afterwards arrested. *Semb. Cro. El.* 404.

But a man in execution shall not be discharged upon *affidavit*, tho' there be cause; but ought to have a *superfedeas*, or other matter of record. *Pr. Reg. tit. Execution.*

[If defendant surrenders in discharge of bail, and plaintiff does not proceed against him, he may have a *superfedeas* to the execution the fourth term after, both inclusive. *Smith v. Green*, P. 1723, *Bunb.* 128.]

[If plaintiff is rendred in vacation, it shall be considered as of the preceding term. *Barnes*, 386.]

[If defendant surrendered in discharge of bail, is afterwards, without notice of plaintiff, removed to the *Fleet*, and next term plaintiff charges him in execution as a prisoner in *B. R.*, the court in the term after will grant him a *superfedeas*; for the plaintiff should have asked to see him, and prisoners shall not be obliged to give notice of removal. *Filkes v. Allen*, P. 14 G. 2. *Str.* 1153.]

[If defendant after judgment surrenders, and lies two terms, without being charged in execution, during which plaintiff brings action on the judgment, and recovers, and plaintiff lies two terms more without being charged, and plaintiff brings a second action on the second judgment; the court will grant a *superfedeas* for the two first actions, and order common bail to be taken for the third. *Chambers v. Robinson*, M. 1 G. 2. *Str.* 782.]

[Delivery of *ca. sa.* to gaoler is not sufficient charge in execution; it must be delivered to sheriff, and his warrant to gaoler. *Barnes*, 389.]

[Defendant obtains *superfedeas* for want of prosecution, and is again arrested as drawer of a bill, for part of original debt, which is not accepted; this creates no new debt, and he shall have *superfedeas* on common appearance. *Barnes*, 397.]

[Defendant *superfedeable* for want of judgment in three terms, summons plaintiff, who obtains judgment after the three terms, brings *habeas corpus ad satisfaciendum*, and charges him in execution; he shall have *superfedeas*. *Barnes*, 398.]

[If defendant has *superfedeas*, but does not lodge it before the *habeas corpus*, he shall be charged, and may apply afterwards; plaintiff may proceed at his peril. *Barnes*, 379.]

[If a *committitur* is entred on the roll in time, it is sufficient; and defendant shall not be discharged, tho' there is no *committitur*-piece. *Duchess of Marlborough v. Widmore*, H. 9 G. 2. *B. R. H.* 208.]

[There is no extension of the time to the continuance-day after term, nor is an entry in time in the marshal's book sufficient; the *committitur* must be actually entred on record before the end of the second term. *Unwin v. Kirchoffe*, M. 18 G. 2. *Str.* 1215. *Fotterel v. Philby*, H. 6 G. 3. 3 *B. M.* 1841.]

[Plaintiff

[Plaintiff shall have *every* day of the second term after final judgment signed, to charge a prisoner in execution; therefore if defendant hinders plaintiff from so doing for several days, by bringing of writ of error, he shall not have *superfedeas*. *Garrat v. Mantel*, P. 8 G. 3. 2 *Wilf.* 380. *Barnes*, 369. 379.]

[When a defendant surrenders in discharge of his bail in the vacation *after verdict* against him, the plaintiff must charge him in execution within the two following terms. *Smith v. Jefferys*, B. R. T. 36 Geo. 3. 6 T. R. 776.]

[If defendant is not charged in two terms by accident only, (as the writ directed to the sheriff of a city instead of the county,) he shall not be discharged. *Barnes*, 380.]

[If plaintiff does not proceed to final judgment in the third term after declaration, inclusive, defendant shall have *superfedeas*. *Barnes*, 379.]

[So, for want of getting demurrer argued. *Barnes*, 383.]

[Plaintiff's attorney proceeds irregularly to interlocutory judgment, waives it, and gives new rule to plead; if he does not proceed to final judgment in three terms, defendant is not to be hurt by plaintiff's mistake, and shall have *superfedeas*. *Barnes*, 390.]

[If defendant is superseded for plaintiff's not proceeding to judgment in three terms, plaintiff may afterwards proceed to judgment, and take him or charge him in execution. *Mitchel v. Pate*, T. 9 G. 2. B. R. H. 287.]

[If defendant has rule for *superfedeas*, for want of judgment; but before discharged, plaintiff charges him with new declaration on different cause of action, he cannot be discharged. *Barnes*, 500.]

[If prisoner escapes, his recaption is the time of his render, and plaintiff has time from thence. *Barnes*, 382.]

[Prisoner cannot apply for *superfedeas*, and also to be discharged on the lords' act. *Barnes*, 383.]

[If writ of inquiry is executed before a person not properly deputed, defendant shall have *superfedeas* for want of judgment. *Barnes*, 384.]

[If after writ of inquiry awarded, and before it is executed, plaintiff becomes bankrupt, and proceeds to execute the inquiry, and to final judgment, in his own name, and then assignees bring *scire facias*, to which defendant (a prisoner) pleads a plea held bad on demurrer; defendant shall not have *superfedeas*, because not charged in execution the term after final judgment, for his own bad plea prevented it. *Bibbins v. Mantel*, P. 8 G. 3. 2 *Wilf.* 378.]

[The court will not discharge, on motion, an infant plaintiff suing by *prochein amy*, taken in execution for costs. *Gardiner v. Holt*, M. 18 G. 2. *Str.* 1217.]

[*A.* arrested at the suit of *B.* on *ca. sa.* pays the money to sheriff; he cannot apply that money to a *fi. fa.* against *B.* at the suit of *A.*, but shall pay *B.* the money levied under the *ca. sa.* *Barnes*, 214.]

So, if a *superfedeas* be delivered to an officer, he may detain the party till he takes a reasonable time to be informed of the import of it. *Dub. Cro. El.* 404.

So, if he pays the debt to the marshal, being committed to him, he shall not be discharged. *Per two J. Wild cont.* 2 *Mod.* 214. *R.* 2 *Lev.* 203.

So,



So, if the plaintiff dies, and the defendant has right of administration to him, he shall not be discharged till satisfaction acknowledged, which he cannot do himself; but another must take out administration, and acknowledge satisfaction upon the judgment. *R. 2 Mod. 315.*

[A defendant who has been superseded, for want of being charged in execution, within two terms after judgment, *cannot* be held to *special bail*, in an action brought on such judgment, but he may be charged in *execution*, after judgment obtained in the *second* action. *Corp. 72.*]

[Bringing an action on a judgment within two terms is not equivalent to charging the defendant in execution. *Childs v. Prowse, C. P. H. 18 G. 2. Willes, 531.*]

[If a person is arrested on *mesne process*, after the writ is returnable, the sheriff cannot legally detain him, even for the shortest time, till the writ is continued. *Loveridge v. Plaistow, C. P. E. 32 Geo. 3. 2 H. Bl. 29.*]

[If the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.* he cannot afterwards retake him or take any of the others. *Clark v. Clement, B. R. H. 36 Geo. 3. 6 T. R. 525.*]

[A separate *ca. sa.* against one defendant on a joint judgment against two, cannot be supported. *Ibid.*]

[Where a prisoner in execution is discharged by the consent of his creditor, on giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jaques v. Withy, B. R. H. 27 Geo. 3. 1 T. R. 557.*]

[If the plaintiff consent to the defendant being discharged out of execution, on his undertaking to pay at a future day, he cannot afterwards sue out any execution on that judgment in the event of the defendant's not fulfilling his undertaking. *Tanner v. Hague, B. R. M. 38 Geo. 3. 7 T. R. 420.*]

[Neither can the plaintiff maintain an action on the judgment; tho' he may, on the defendant's *new* undertaking. *Vigers v. Aldrich, B. R. M. 10 Geo. 3. 4 Burr. 2482.*]

[The bail-bond was ordered to be delivered up to be cancelled, because the defendant was arrested before the officer had any warrant, and before the writ was delivered to the sheriff. *Hall v. Roche, B. R. E. 39 Geo. 3. 8 T. R. 187.*]

(C 14.) By *Elegit*.

So, now by the *st. W. 2. 18.* upon judgment or recognizance *fit in elections* of the plaintiff *quod vicecomes si. ri faciat de terris & catallis, vel quod liberet omnia catalla (exceptis bobus & afriis caruca) & medietatem terræ quousque debitum fuerit levatum per rationabile pretium & extantum.* *Co. L. 289. b. 2 Inst. 394. Vide Process, (E 6.)*

If the plaintiff prays an *elegit*, the entry shall be, *quod elegit sibi executionem de omnibus catallis, & medietate terræ.* *2 Inst. 395.*

Execution by *elegit* may be by an executor or administrator, as well as by the plaintiff himself. *2 Inst. 395.*

By the successor of the conusee, where a recognizance is made

to a corporation; as, to the chamberlain of *London*. 2 *Inst.* 395. *R.* 4 *Co.* 65.

So, it may be upon a precept to a serjeant at mace in *London*, or other officer of any court of record, who does execution, as well as upon process to the sheriff. 2 *Inst.* 395. *R.* 4 *Co.* 65.

So, upon a mandate by the sheriff to the bailiff of a franchise, which has execution and return of writs. *R.* *Cro. Car.* 319.

So, it lies against an executor or administrator upon a *devastavit*. *R.* 2 *Leo.* 188.

If an *elegit* upon a judgment, and another upon a statute, be delivered to the sheriff at the same time, execution shall be first made upon the judgment; for that is upon a record. *Br. Jud.* 79.

But an *elegit* against an heir does not lie during his minority; tho' he be charged as terre-tenant. *Co. L.* 290. *a.*

Nor, against the wife of the defendant, endowed by the heir within age. *Co. L.* 290. *a.*

If an *elegit* be prayed, the sheriff shall take an inquisition; for there shall be a reasonable appraisement of the goods, and extent of the lands; which shall be made by an inquest of 12 men. 2 *Inst.* 396. *Dy.* 100. *Cro. El.* 584.

And the inquisition ought to find the lands with certainty; for to find no certain estate will be insufficient. *Clift.* 877. *Vide Statute Staple*, (D 5.)

It ought to shew the place and county where the inquisition is taken, and where the lands lie. *Semb. Dy.* 208. *b.*

[If no lands is returned, sheriff need not return an inquisition. *Stonehouse v. Ewen*, *T.* 4 *G.* 2. *Str.* 874.]

After the inquisition found, the sheriff shall deliver the moiety; but the jury need not divide it. *R.* *Cro. Car.* 319.

So, the sheriff ought to deliver the lands described with certainty; for, to say that he delivered a moiety, is not sufficient. 1 *Vent.* 259.

Described by metes and bounds. *Hut.* 16. Distinctly. 1 *Brownl.* 38. But it need not be by metes. *Dal.* 26. *Vide Doug.* 475.

He ought to deliver a moiety only; for if he delivers more, it will be void for the whole. 1 *Sid.* 91. 239.

If the defendant be joint-tenant, or tenant in common, it ought to be specially mentioned in the return. *Hut.* 16. 1 *Brownl.* 38.

The sheriff shall make execution of all the goods.

And if it appears that the goods are sufficient for the debt, the sheriff ought not to extend the land. 2 *Inst.* 394.

If the goods are not sufficient, he ought to extend a moiety of all the lands which the defendant or conusor had at the time of the judgment, &c. 2 *Inst.* 395.

If there are divers conusors, a moiety of the lands of all. 2 *Inst.* 396.

If the defendant has aliened after judgment, a moiety of the land in the hand of the purchaser, as well as of the defendant. *Ibid.*

If the lands lie in several vills, a moiety of the land in all; and not the whole in one vill. *R.* 1 *Lev.* 160. *Cont. Bro. Elegit*, 14.

[The sheriff on an *elegit* is not bound to deliver a moiety of each particular tenement, but only certain tenements and farms, making in value a moiety of the whole. *Doug.* 475.]

And

And he may extend a term for years, tho' it be a chattel. 2 *Inst.* 396.

And lands, which the conufor or defendant has by extent upon a statute-merchant, &c. 1 *Rol.* 887. l. 52. R. 4 Co. 65. b. *Vide infra.*

So, lands which are *antient demefne*. 2 *Inst.* 397. R. 1 *Rol.* 888. l. 5.

So, a reversion of land upon a lease for years; and the conufee fhall have a moiety of the rent. 1 *Rol.* 894. l. 12. 3 *Leo.* 113. *Mo.* 36.

So, all tenements, as well as land, of the defendant; as, a rent, &c. *Bro. Elegit*, 13. *Mo.* 32.

So, two-thirds of a rent may be extended, tho' the defendant has the whole. R. *Cro. El.* 742.

So, he may extend upon an *elegit* lands before in execution upon a statute. R. 4 Co. 64. b. *Vide supra.*

So, now by the *ft.* 29 *Car.* 2, 3. lands, tenements, &c. of which any fhall be feifed or poffeffed in trust for him againft whom execution is fued, of fuch eftate as the trustee was feifed at the time of execution fued.

But upon an *elegit* the fheriff cannot extend a copyhold. R. 1 *Rol.* 888. l. 1. *Vide Copyhold*, (R 18.)

Nor, a term for years of a copyhold made by the licence of the lord. R. 1 *Rol.* 888. l. 3.

Nor, lands of which the defendant is diffeifed, whilft they are in poffeffion of the diffeifor. R. 1 *Rol.* 888. l. 7.

Or, of which he has only the trust, and not the eftate in law. R. 1 *Rol.* 888. l. 12. But this is altered by the *ft.* 29 *Car.* 2. 3.

Nor, fince the *ft.* 29 *Car.* 2. 3. lands which the trustee has aliened before execution; for they are not bound by the judgment. R. *per C. B.* — *Ann. inter Johnson and —*, cited *per Tracy.* (*Vide Com. Rep.* 227.)

Nor, the land of a villein upon an *elegit* againft the lord; for it is the land of the villein, till the lord feizes it. 1 *Rol.* 888. l. 20.

Nor, a tenement which cannot be granted, or affigned over; as, the office of filazer; for it is an office of trust. *Dy.* 7. b.

So, a bare rent feck without land cannot be extended. R. *Cro. El.* 656.

So, if two have judgment, and one fues an *elegit*, and has a moiety, and afterwards the other fues an *elegit*; the fheriff fhall deliver but a moiety of the residue. R. *Cro. El.* 482. *Cont. Fitz. Execution*, 137. but there faid, *Quod mirum.* R. *M.* 32 & 33 *El.* in *C. B. Br. J.* 78. *Hard.* 25, 6. R. 2 *Brownl.* 97.

Yet, if both judgments are of the fame term, which is but one day in law, each may take a moiety of the whole. R. *per three Bar.* *Hard.* 27.

If the judgment be reverfed, the fale and delivery of a term extended upon the *elegit* fhall be void. R. 2. *Cro.* 246. *Dy.* 363. a. in *marg.* *Yel.* 180.

After inquisition taken by the fheriff, it fhall be returned and filed. *Dy.* 100. in *marg.*

And after it is filed, it fhall not be avoided upon furmife that more is extended than a moiety. 2 *Inst.* 396.



Or, that it was extended at a small value. 2 *Ca. Ch.* 183.

And tho' the extent was at an under-value, the plaintiff shall account only for the value at which the extent is. *R.* 2 *Ca. Ch.* 183.

But before inquisition filed, the court may examine it; and if they find fraud, partiality, &c. may stop the filing, and award a new *elegit*. 2 *Inst.* 396.

So, if they find an extent made at an under-value. 2 *Ca. Ch.* 183.

So, if the whole due upon the judgment be brought into court. *R.* 2 *Ca. Ch.* 183.

So, if the inquisition appears to be void, it may be quashed after it is filed. *Semb.* 1 *Vent.* 259.

And in ejectment advantage may be taken of the nullity. *R.* 1 *Lev.* 160. *Per Hale*, 1 *Vent.* 259. *R.* *Sal.* 563.

As, if more than a moiety appears to be extended. 1 *Vent.* 259. *Sal.* 563.

Or, all in one vill, and nothing in another. *R.* 1 *Lev.* 160. *Contra, Dougl.* 475. (459.)

The entry of the *elegit* upon the record should not, in prudence, be made till the return filed. 2 *Cro.* 339. *Godb.* 257.

After the inquisition returned, there shall be a *liberate*, if the plaintiff will. *Vide Statute Staple*, (D 6.)

Yet, before the *liberate*, or inquisition returned, the plaintiff may enter. *R.* 1 *Rol.* 738. *l.* 10.

And if the sheriff returns that he has delivered, when he has not, an action on the case lies for a false return; tho' the plaintiff may enter without it. *R.* 1 *Rol.* 738. *l.* 15.

Tenant by *elegit* has but a chattel. 2 *Inst.* 396.

Yet he shall hold *ut liberum tenementum*, and he, his executor or administrator, shall have an assise. *Ibid.*

After the debt satisfied upon record, or by the annual rent, at which the extent is made, the defendant may enter. 2 *Inst.* 396. 2 *Vent.* 236.

But if the debt be satisfied by a casual profit, he ought to have a *scire facias* before entry. 2 *Inst.* 396.

So, if he bring a *scire facias*, and tenders all that remains satisfied, he shall have his land. 2 *Ca. Ch.* 183.

### (D) To what Time an Execution relates.

#### (D 1.) As to Land.

**BY** the common law, the lands of the defendant were bound by the judgment; and therefore, before the *ft.* 29 *Car.* 2. 3. the plaintiff might have had his execution of lands, which the defendant had at the time of the judgment given, or afterwards. 30 *Ed.* 3. 24. *Dy.* 306. *b.* 1 *Rol.* 892. *l.* 37. 1 *Inst.* 395.

Or, at the first day of the term, in which judgment was given; for that term is but one day. *R.* 42 *Aff.* 17. *Bro. Elegit*, 17. 19. 1 *Rol.* 892. *l.* 40.

Tho' the judgment was signed after the term. 2 *Mod. Ca.* 310.

Or, at the day of the inquest taken; for this is but one day with the day in bank. 21 *Ed.* 3. 51. *b.* *Adm. Dy.* 149. *a.*

And the plaintiff shall have execution of lands, which the defendant

ant had at the time of the judgment, tho' he had aliened them *bonâ fide* before execution sued. 30 *Ed.* 3. 24.

Tho' a statute be afterwards acknowledged, and execution upon it. 1 *Brownl.* 37, 8.

So, the demandant shall have execution against the vouchee of lands, which he had at the time of the voucher; for this is in lieu of an action. *Co. L.* 102. *a.*

And in a *warrantia charta*, of land, which the defendant had the day of the writ purchased. *Co. L.* 102. *a.*

By the *st. de merc.* 13 *Ed.* 1. (to which the *st.* 27 *Ed.* 3. and 23 *H.* 8. 6. relate) the conusee of a statute shall have execution of lands which the conusor had at the time of the conufance.

And if it be acknowledged before a judge out of term, when entered upon record, it relates to the time of the acknowledgment. *R. Hob.* 195. 1 *Roll.* 892. l. 35.

So, if after a statute, a judgment be against him, and execution by *elegit*, the land at the time of the conufance shall be extended, and the execution by *elegit*, avoided. 1 *Brownl.* 37.

If a judgment be in *Trinity* term, which relates to the first day, which was 20th *June*,) and a statute be acknowledged 20th *June*, execution upon the judgment shall precede the statute, *Latch.* 53.

So, if there be a *capias ad satisfaciendum*, and then an extent, and before an inquisition taken, the defendant sells his goods, they shall be liable to the extent. *R. Mo.* 21.

But a judgment in a personal action binds lands only from the day of the judgment given. *Co. L.* 102. *a.*

And therefore, by the common law, the plaintiff shall not have execution of land, which the defendant had the day of the writ purchased. 42 *Ed.* 3. 11. *R.* 2 *H.* 3. 14. 6 *Ed.* 3. 15.

Or, at the time of his plea, if it be in the same term, before judgment. 42 *Ed.* 3. 11. *R.* 42. *Aff.* 17.

Or, at the day of the inquest returned, or inquest taken, if it was afterwards adjourned; for then it is not one with the day in bank. 21 *Ed.* 3. 51. *b.* 1 *Roll.* 892. l. 7.

So, now by the *st.* 29 *Car.* 2. 3. the officer shall set down the day of the month and year of his signing judgment on the paper, &c. he signs, which shall be entered on the margin of the record, where the judgment is entered; and such judgments shall relate, against purchasers *bonâ fide* for valuable consideration of lands, &c. only to the time of signing; and not to the first day of term when entered, return of the original, or filing bail.

And by the same statute, the day of inrolment of a recognizance shall be entered on the margin of the roll; and no recognizance shall bind lands, &c. in the hands of a purchaser *bonâ fide* for valuable consideration, but from the time of such inrolment.

And therefore, if judgment be pronounced, but not entered upon the roll till several terms afterwards, it ought not to be entered without continuances to the term when entered; for it ought not to bind a purchaser till that term. *Mod. Ca.* 184. 191.

Yet, if it be entered in the vacation before the effoign-day of the next term, it binds a purchaser after the term, before entry. *Per Holt, Mod. Ca.* 191.

## (D 2.) As to Goods.

By the common law, goods and chattels are bound by the award of execution; and if they are afterwards sold *bonâ fide*; yet they may be taken in execution. *R. 2 H. 4. 14. 1 Rol. 893. l. 10. R. Mo. 873. R. Cro. El. 174. D. 8 Co. 171. a. 2 Cro. 451. Cro. Car. 149.*

So, if the defendant dies, they might be taken in the hand of his executor or administrator. *R. 1 Rol. 893. l. 23. R. Cro. El. 181. 1 Leo. 144.*

But a sale after the original, and before judgment, shall be good. *R. 9 H. 6. 57. b. 1 Rol. 893. l. 5.*

And now, by the *st. 29 Car. 2. 3.* no *fiery facias*, or other writ of execution, shall bind the property of goods, but from the time such writ shall be delivered to the sheriff, &c. to be executed, who, on his receipt of it, shall indorse the day of his receiving the same.

And therefore, if a writ of execution be sued, it does not bind, till it be delivered to the sheriff.

If it be delivered to him, and no warrant prayed upon it, and afterwards another execution is delivered, and execution prayed, he may execute the last first. *R. M. 9 W. 3. B. R. inter Smallcomb and Buckingham, 5 Mod. 377. 1 Sal. 320.*

[If a *fiery facias* is fraudulently or insufficiently executed, and no person left in possession, and another plaintiff gets his execution executed afterwards; this second shall stand good, and the sheriff may return *nulla bona* on the first. *Bradley v. Wyndham, H. 17 G. 2. Wilf. 44.*]

If it be upon a subsequent judgment, and executed upon goods, it shall be good, tho' an execution upon a former judgment or statute afterwards comes to the sheriff. *R. 1 Brownl. 37.*

Yet, it binds the goods (as to the party himself, tho' not as to a purchaser or stranger) from the *teste* of the writ, as before that statute. *R. P. 3 W. & M. in B. R. Skin. 257. 2 Mod. Ca. 310.*

And therefore, if a *fiery facias* be teste'd before the death of the defendant, and delivered to the sheriff after his death; it may be executed upon goods in the hands of the executor or administrator. *Semb. 2 Vent. 218. R. Skin. 257. [Per Cur. clearly, Springer v. Somerville, M. 1729, Bunb. 271.]*

[A judgment signed in any part of the term or the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed; and an execution against the goods of the defendant may be taken out upon it, teste'd the first day of term. *Brogner v. Langmead, B. R. M. 37 G. 3. 7 T. R. 20.*]

So, if two writs are delivered to the sheriff the same day to make execution, without assent of delay, he ought in the first place to make execution upon the first. *R. 1 Sal. 320.*

[*Testatum capias* teste'd the last day of term is good, tho' the judgment was not signed till after term. *Deacon v. Cartwright, H. 12 G. 2. Andr. 308.*]

## (E) By whom it shall be sued.

By or against whom **E**xecution ought to be sued by him, who is error shall be sued.] party or privy to the record. *Vide Pleader, (3 B 9, 10.)* ln



In a real action, if the demandant dies, his heir shall sue execution.

In personal actions, the executor or administrator shall sue execution by *scire facias* upon a judgment by his testator or intestate. 2 *Inst.* 395.

When an executor or administrator shall have a *scire facias* or not, *vide in Administration* (G).—*Pleader*, (3 L 5.)

So, in annuity, the executor shall have execution, and not the heir; for by recovery the arrearages are a chattel vested. 1 *Rol.* 889. l. 25.

So, in a mixt, or real action, where damages are recovered, tho' the heir has execution of the land, the executor shall have execution for the damages; as, in waste, assise, &c. 1 *Rol.* 889. l. 30.

But does not lie by him, who is not party or privy, generally. *Vide Pleader*, (3 L 5. 7.)

Nor, by him who has no interest in the thing recovered, tho' he be privy, or party; as, it does not lie by a husband upon a judgment by him and his wife as executrix. R. 1 *Rol.* 889. l. 10. *Vide Baron and Feme* (Z).—*Pleader*, (3 L 7.)

[If on judgment by husband and wife plaintiffs, the *fieri facias* is to have the money to be rendred to the husband only; it is irregular, and shall be set aside. *Barnes*, 424.]

### (F) Against whom.

SO, execution ought to be sued against him who is party or privy. *Vide ante*, (A 2.)

If one of the defendants die, it may be sued against the survivor and him who is dead. R. 1 *Sal.* 319. *Vide infra*.

So, if judgment be against husband and wife, and one dies, execution may be against the wife if she survives. 1 *Rol.* 890. l. 27.

So, if a *scire facias* be against all the defendants, and one is returned *nihil*, execution may be for the whole against the others. 1 *Rol.* 890. l. 10. 50.

So, if a defendant dies, execution may be by *scire facias* against his executor or administrator. *Vide Pleader*, (3 L 6.)

And, if the writ be teste'd before his death, it may be executed against his executor or administrator, without a *scire facias*. *Vide ante*, (D 2.)

So, if the plaintiff dies, execution may be made without a *scire facias*. Dy. 76. b. in marg. *Vide Pleader*, (3 L 1.)

But, execution taken out after the death of the defendant, against his executor or administrator, without a *scire facias*, is void. Dy. 76. b.

So, if it be taken against the survivors, where one of the plaintiffs in error dies, without entry of the death on the roll, and award of execution against the survivors. R. 5 *Mod.* 339. R. 1 *Sal.* 319.

So, execution may be against a party to a judgment, tho' he be misnamed in his addition or degree; for he is estopped by the record to say, that he is not of such degree. R. 1 *Rol.* 890. l. 45.

## (G) By whom it shall be done.

**E**Xecution, regularly, ought to be directed to the sheriff of the county, where the action was brought. 1 *Rol.* 891. l. 15. *Vide Bail*, (R 2.)—*Pleader*, (3 L 3.)

And the sheriff makes a warrant to his bailiff to do execution pursuant to the writ.

So, the sheriff may do execution after his discharge is teste'd, or sealed, if he has not notice. *R. Cro. El.* 440. *Vide County*, (B 3.)

But upon a return, that the defendant has nothing in his county, a writ of execution may be to the sheriff of another county. 1 *Rol.* 891. l. 17. *Vide Process*, (E 7.)

Yet, if a *testatum* goes where a former writ was not actually issued; tho' it be recited in the *testatum*, it will be error. *R. 2 Cro.* 246. *Rel.* 179.

[By 12 G. 2. c. 13. §. 4. sheriffs' officers shall indorse attorney's name on writs, under 5 l. penalty.]

## (H) When Execution may be after a former Execution.

**I**F a former execution be not effectual, the plaintiff, generally, may have another execution; as, if the defendant escapes, he may be retaken by the sheriff, or the party himself, and shall be in execution again. *Vide Escape* (E). *Vide ante*, (A 3.)

*A fortiori* if he escapes, when taken upon a *capias utlagatum*, or *capias pro fine*; for the plaintiff need not allow, that he shall be in execution for him. 1 *Rol.* 901. l. 15. *Vide ante*, (B 2.)

[The first *fi. fa.* need not be filed before *testatum* issues, it is enough if produced returned. *Barnes*, 200. 208, 209. 211.]

[On judgment in *Middlesex*, *fi. fa.* returned *nulla bona*; common *fi. fa.* (without *testatum*) may issue to another county. *Barnes*, 196.]

If a man in execution be bailed by the court, he may afterwards be taken in execution again. *Per Co.* 1 *Rol.* 903. l. 1.

So, by the *st.* 11 H. 6. 5. if he brings an *audita querela*, and finds mainprize thereon, but afterwards does not prosecute with effect. 1 *Rol.* 902. l. 50.

So, if he be delivered out of execution by privilege of parliament, being a burgess, &c. he may afterwards be taken in execution again. *R. 1 Rol.* 903. l. 20. *Godb.* 373.

So, if the former execution be defeated by error. *R. Godb.* 272. *Latch*, 193.

So, by the *st.* 21 Jac. 24. if a man dies in execution, it may afterwards be sued of his land or goods.

So, before that statute; for the body was not a satisfaction, but a pledge only for the debt. *R. 5 Co.* 87. *R. cont. Cro. El.* 850. 2 *Cro.* 136. 143. *R. cont per three J. Hob.* 60. *Mo.* 858. 1 *Rol.* 903. l. 40.

So, since that statute, shall it be without question.

So, if one of the defendants escapes, the plaintiff may afterwards sue execution against the other, tho' he has a remedy against the sheriff.

riff. R. 5 Co. 86. b. Cro. El. 555. 573. Cont. Mo. 459. R. acc. 2 Cro. 532. R. Cro. Car. 75. Vide Escape (E).

So, if the conusor upon a statute or recognizance escapes, the conussee shall have execution against his lands and goods. R. 5 Co. 86. b. 87. b.

So, if only part of the debt be levied, there may be another execution for the residue.

If upon an extent, *non inventus est* is returned, *quoad* the body of the party, and land in right of his wife; tho' he take the land, he shall afterwards have a *capias* against the person. R. 15 H. 7. 15.

So, if part of the debt be levied by a *feri facias*, he may afterwards have an *elegit*. 1 Sid. 91.

So, if an *elegit* be returned *nihil*, or nothing can be extended upon it, there shall be another execution. Vide *infra*.

So, if only part of the debt be levied by *elegit*, on the goods only, he may have debt upon the judgment for the residue. R. 1 Lev. 92.

So, the plaintiff after judgment may have a *capias ad satisfaciendum* and a *feri facias* together, and execute the one or the other: but if he takes the defendant upon the *capias ad satisfaciendum*, the *feri facias* shall be quashed. 2 Mod. Ca. 302.

[The court will set it aside on motion. *Jeanes v. Wilkins*, H. 1748, 1 Ves. 195.]

But if the plaintiff has full execution and satisfaction, he shall never afterwards have a new execution for the same cause. Mod. 29.

Tho' the execution be afterwards defeated by the act of God; as, if a villein be delivered in execution for a debt, and he afterwards dies without issue. 5 Co. 87. a.

So, if the sheriff levies the debt of the goods, or extends the lands of the defendant, and delivers them to the plaintiff; for then the plaintiff accepts the goods and lands in satisfaction. 5 Co. 87. a.

So, if the plaintiff had execution and satisfaction against one of the defendants, he shall not afterwards have execution against the other. R. 2 Cro. 338. 1 Rol. 9. Vide *Action*, (K 4.)

Tho' it be in debt, where they are bound jointly and severally. 1 Rol. 896. l. 20. 25.

Tho' several actions are sued against each severally. 1 Rol. 896. l. 25.

So, in trespass against several, if the plaintiff has execution and satisfaction against one, he shall not afterwards have execution against the others. R. 1 Rol. 896. l. 30.

Tho' he recovers by several actions in several courts. 1 Rol. 896. l. 35.

Yet where the defendant cannot plead; as, where there is a recovery by several actions, the defendant cannot be relieved but by *audita querela*. R. 1 Rol. 896. l. 40. 45.

So, if the plaintiff has judgment against the principal, and also against the bail, and execution against the principal, he shall not afterwards have execution against the bail. 2 Cro. 320. Vide *Bail*, (R 11.)

So, if he has the principal in execution, tho' he be not satisfied; for he has made his election. 1 Rol. 897. l. 10. R. cont. 2 Jon. 75. 1 Vent. 315.

So,



So, if he takes execution against the bail, and has satisfaction, he shall not afterwards have execution against the principal.

Otherwise, if he has not satisfaction against the bail; for then he may resort to the principal. *Cont. 1 Rol. 897. l. 7. 2 Cro. 320. 2 Bul. 68. R. acc. 2 Cro. 549. R. 1 Sid. 107. 1 Vent. 315. Vide Bail, (R 11.)*

So, tho' he has execution against one of the bail, if he be not satisfied, he may have execution against the other. *1 Rol. 897. l. 15. R. 1 Lev. 226. Vide Bail, (R 11.)*

[But if a moiety of damages is levied on one bail, plaintiff cannot have second execution against him, tho' the other bail is insufficient, for he might have levied all at first. *Barnes, 202.*]

So, if a man has execution by *elegit* returned, *served*, upon record, he shall not afterwards have execution by *capias ad satisfaciendum*; for he has made his election. *R. Hob. 2. in marg. 30 Ed. 3. 24. 2 Inst. 395. 1 Lev. 92. R. 2 Cro. 338. 1 Rol. 9. R. 15 H. 7. 15. 2 Bul. 97.*

Nor, by *fieri facias*, or other execution. *1 Lev. 92.*

Otherwise, if the *elegit* be returned *nihil*. *Qu. Hob. 2. D. Hob. 57. 1 Lev. 92. 1 Leo. 176.* And it be entred on the roll. *Br. Jud. 78.*

Or, the land cannot be extended, by reason of a prior extent. *R. Cro. El. 160. 1 Leo. 176.*

Or, the writ be embezzled. *1 Rol. 8.*

[If plaintiff takes out an *elegit*, and levies part of the debt upon the goods, and has a *nihil* returned as to the lands, he may afterwards sue out a *capias ad satisfaciendum*. *Beacon v. Peck, M. 6 G. Str. 226.*]

[And if the defendant is in custody, he shall not be discharged, tho' part of the debt is levied by *elegit* on his goods, if it be returned that he has no lands. *Lancaster v. Fielder, M. 13 G. Ld. Raym. 1451.*]

[If *fi. fa.* is executed, and part of the debt levied, plaintiff cannot before the return sue out *testatum fi. fa.* and levy the residue. *Barnes, 213.*]

[So, if upon an *elegit* an extent be made, but the *liberate* not returned, and the entry upon record is, *vicecomes nihil inde fecit, nec misit breve*, another *elegit* may be sued. *R. 2 Leo. 13.*

### (I 1.) By what Court Execution shall be granted.

**R**egularly, execution ought to be granted by the same court where the judgment was given.

If an attaint be in *B.* upon a judgment in *B. R.*, and judgment affirmed; execution ought to be in *B. R.*, and not in *B.*, where they have only *tenorem recordi*. *R. 1 Rol. 887. l. 40.*

If a man recovers in a *scire facias* upon a recognizance in *B. R.*, and in debt upon that judgment in *C. B.*; he may afterwards sue execution out of the record in *B. R.* *Dy. 306. a. in marg.*

But if a record comes into *B. R.* by writ of error, and the judgment be affirmed, execution may be sued there. *1 Rol. 884. l. 34. R. 1 Lev. 134. Cowp. 843. Vide Pleader, (3 B 20.)*

So, if it comes into *B.* upon a writ of false judgment, execution may be sued there. *1 Rol. 884. l. 35.*

So, if a record comes into *B. R.* by error out of an inferior court, whereby

whereby the recognizance of bail, being upon the roll, is also removed thither; a *scire facias* lies against the bail out of *B. R.* *R. 1 Sid. 213.*

[When a record is removed into *B. R.* from a court of a county palatine, by writ of error, and that is non-prossed, *B. R.* will award execution. *3 T. R. 657.*]

So, if judgment in *C. B.* be affirmed upon error in *B. R.*, a *certiorari* lies to remove the recognizance of bail to *B. R.*, by which a *scire facias* may issue against the bail out of *B. R.* *R. 4 Mod. 104. Sho. 344.*

Yet, if judgment in *Ireland* be affirmed in *B. R.* here, and costs here; there shall not be execution out of *B. R.*, directed to the sheriff in *Ireland*; but there shall be a writ, reciting the whole proceeding here, directed to the judges of *B. R.* in *Ireland*, commanding them to issue execution; by which the cause is remanded to them. *R. 1 Sal. 321. 5 Mod. 421. Cowp. 843.*

So, a judgment cannot be removed out of an inferior court, by *certiorari* and *mittimus* into *B. R.*, to have execution by *scire facias* there. *R. Hut. 117. 1 Lev. 134.*

[In a writ of error from *B. R.* to the House of Lords, only a *transcript* of the record is sent up; and when remitted, the *B. R.* awards execution. *Cowp. 843.*]

### (I 2.) By an Inferior Court.

In a court-baron the plaintiff may distrain the goods of the defendant, and detain them till the condemnation be satisfied; tho' he cannot levy it of the goods of the defendant. *1 Rol. 887. l. 35.*

So, judgment in an inferior court shall not be executed upon land or goods out of the jurisdiction.

If there be a recovery in *antient demesne*, it shall not be levied of land, held of the manor, which is *frank-fee*; for that is out of the jurisdiction. *1 Rol. 894. l. 17.*

So, a judgment in an inferior court of record shall not be removed by *certiorari* into *B. R.* to have execution of it there. *Dub. 1 Rol. 887. l. 45. 1 Lev. 134.*

### (I 3.) How it shall be awarded.

Execution ought to be sued conformable to the judgment; and therefore, if the judgment be joint against divers persons, execution ought to be against all together. *R. 1 Rol. 888. l. 30. 35.*

Tho' it be in an assise, &c. where damages are not the principal, a man cannot sue execution for damages against one only, when the judgment was against several. *R. 1 Rol. 888. l. 25.*

So, he cannot take a *capias* against one, and an *elegit* against another. *1 Rol. 888. l. 35.*

So, if there be an information for recusancy, on which judgment is given for 100*l.*; tho' the king shall have two parts, and the informer one, yet there shall be but one execution, and not several; viz. one for the king, and another for the informer. *R. 1 Rol. 888. l. 45.*

But, if judgment be against bail, the execution may be against each of them severally, without naming the other; for each bail is bound

bound severally. 1 *Rol.* 883. l. 40. *R.* 1 *Lev.* 226. *Vide Bail*, (R 11.)

If the defendant confesses the action as to part, and joins issue as to the residue; the plaintiff shall not have execution for the part confessed, except where he releases his damages for the residue. 1 *Rol.* 898. l. 35.

But, if the plaintiff releases his damages, he may have execution for the part confessed immediately. 1 *Rol.* 898. l. 37.

Or, if he be nonsuited upon the issue. 1 *Rol.* 898. l. 40.

So, the plaintiff may have execution immediately after judgment pronounced and signed by the clerk, tho' it be not entered upon the roll. 1 *Rol.* 899. l. 5.

[If judgment is confessed with an express *cesset executio*, and execution is taken out within the time, the court will set it aside; but if defendant pretends to stay by long collateral agreements, he must apply to Chancery. *Francis v. Nass*, T. 7 G. 2. B. R. H. 53.]

[The condition of a bond is a *cesset executio* on a warrant of attorney to confess judgment for the same debt. *Anon.* T. 9 G. 2. B. R. H. 270.]

[Plaintiff cannot have *ca. fa.* and *fi. fa.* at the same time, and warrants thereupon; both shall be set aside. *Barnes*, 198.]

[Nor, execution in one court, if he brings action on the judgment in another. *Barnes*, 203.]

[If plaintiff brings action on judgment, he cannot take execution on the judgment till he has discontinued the action. *Barnes*, 208.]

[Judgment recovered; pending error on that judgment, action on it, and judgment and execution; this is regular; tho' court would stop proceedings in second action, pending error on the first judgment, on application made before second judgment, not after. *Barnes*, 202, 203.]

[All proceedings after appearance should be in the same office; therefore, if judgment in one office, and two *fi. fa.* in another, and *nihil*; then judgment revived, and *fi. fa.*'s and *venditioni exponas* in the second office, it is irregular; but after two years, and action against sheriff for false return, the court will not set them aside. *Barnes*, 204.]

[*A.* has judgment in *C. B.* against *B.* for 106, *B.* has judgment in *B. R.* against *A.* for 102; *C. B.* will direct the one judgment to be set against the other, and execution only for the balance. *Barker v. Brahani*, H. 13 G. 3. 3 *Wils.* 396.]

(14.) *Scire Facias quare Executionem non*, &c.

By the common law, a plaintiff could not have execution upon a judgment or recognizance after a year and a day passed; but ought to commence an action of debt upon the judgment, or recognizance. 2 *Inst.* 469. *Co. L.* 290. b. *Vide Pleader*, (3 L 1, &c.)

But now, by the *st. W.* 2. 13 *Ed.* 1. 45. he may have a *scire facias quare executionem non*, &c. and if the defendant *non venerit, aut nihil sciat dicere, quare executionem non*, &c. *præcipiatur vicecomiti quod exequi faciat.* *Vide* 2 *Inst.* 469.

[*Sci. fa.* must be in the same county where judgment, or where execution awarded. *Barnes*, 207.]

And



And after a year and a day he ought to have a *scire facias* before execution; for if he sues a *capias ad satisfaciendum*, &c. after the year, it is not only erroneous, but void. *R. 4 Leo. 197. Semb. Latch, 193. Cont. semb.*; for the defendant was put to his *audita querela*. *2 Rol. 42.*

[If plaintiff gets judgment in the Petty-bag, (or any court,) tho' he is stayed by injunction; yet after year and day, he cannot sue out execution without *scire facias*. *Hodson v. E. Warrington, H. 1729, 3 P. W. 35. Barnes, 197.*]

[The year shall be computed from the day of signing judgment to issuing the writ, not by the number of terms. *Barnes, 197.*]

So, within the year, he ought to have a *scire facias*, where the recovery is of a reversion or remainder after a term for years. *1 Co. 94. b.*

But there needs no *scire facias*, if error be brought of the judgment within a year after the judgment, till a year and a day after the error or judgment thereon affirmed. *R. 5 Co. 88. a. Vide Pleader, (3 L 4.)*

So, if a recognizance be to be paid at a future day within a year, there needs no *scire facias* till a year and a day after the time of payment. *1 Rol. 899. l. 52.*

So, if there be judgment in annuity, execution may be without a *scire facias* upon every payment which accrues, tho' it be above a year after the judgment. *1 Rol. 900. l. 5.*

So, if a *feri facias* or *elegit* be sued, and no execution thereon, there may be another *feri facias*, or *elegit*, several years after, without a *scire facias*, if continuances are entred from the first *feri facias*, or *elegit*. *1 Sid. 59.*

[So, if *fi. fa.* sued within the year, and *nulla bona* returned, and continued down several years, a *capias ad satisfaciendum* may issue, without a *scire facias*. *Aires v. Hardress, T. 4 G. Str. 100.*]

[But if execution is not returned by the sheriff, or not filed, continuances on it cannot be entred on the roll; and if they are, and thereupon a *ca. fa.*, after the year, without *sci. fa.*, defendant shall be discharged out of custody, and plaintiff pay costs. *Blayer v. Baldwin, T. 31 G. 2. 2 Wils. 82.*]

[If *fi. fa.* is not returned, continuances entred on the roll are not sufficient to support *ca. fa.* on a judgment not revived. *Barnes, 213.*]

[Judgment, action on it, superseded for want of declaration; *ca. fa.* after a year from the judgment without *sci. fa.* shall be set aside; for the *cap. ad respondendum* will not warrant continuance on the roll. *Barnes, 206.*]

So, if judgment be with *cesset executio*, by agreement, till such a time, there needs no *scire facias* till a year and a day after the time agreed; tho' such *cesset*, &c. is not entred upon the roll. *Med. Ca. 288.*

So, where the entry if the demandant is *congeable*, there needs no *scire facias*. *Dy. 376. b. in marg.*

So, in ejectment, there needs no *scire facias*; for the *st. W. 2.* extends only to personal actions. *Skin. 427. R. 1 Sid. 351. R. cont. Sal. 258. 600.*

## EXECUTION.

Execution in Accompt.

*Vide Accompt*, (E 16.)

———— in Annuity.

*Vide Annuity* (H).

———— against Bail.

*Vide Bail*, (R 11.)—*Ante*, (C 9.—G—I 3.)

———— in a County-Court.

*Vide County*, (C 13.)

———— in Covenant.

*Vide Pleader*, (2 V 18.)

———— in a Court-Baron.

*Vide Copyhold*, (R 18, 19.)

———— of a Decree.

*Vide Chancery*, (Y 4.)

———— for a Fine at the Sessions.

*Vide Justices of Peace*, (D 15.)

———— of a Foreign Sentence.

*Vide Admiralty*, (E 17.)

———— against an Heir.

*Vide Pleader*, (2 E 6.)

———— of a Peer.

*Vide Parliament*, (L 45.)

———— of a Power.

*Vide Chancery*, (4 H 5, &c.—4 O 6.)—*Poiar*, (C 1, &c.)———— in a *Quo Warranto*.*Vide Quo Warranto*, (C 7.)———— in *Replevin*.*Vide Pleader*, (3 K 31.)

Execution of Orders of Commissioners of Sewers.

*Vide Sewers, (H 3.)*

\_\_\_\_\_ upon a Statute or Recognizance.

*Vide Statute Staple, (D 1, &c.)*

\_\_\_\_\_ of a Trust.

*Vide Chancery, (4 W 9.)*

\_\_\_\_\_ pleaded to Debt upon Judgment.

*Vide Pleader, (2 W 36.)*

Remedy for Rent by Payment of the Sheriff upon an Execution.

*Vide Rent, (D 8.)*

EXECUTOR.

*Vide Abatement, (E 13.—F 10.)—Administration.—Administrator, (C 1, &c.)—Biens (C).—Chancery, (3 G 1, &c.—4 A 9.)—Covenant, (B 1.—C 1.)—Obligation, (I 1.)—Pleader, (2 D 1, &c.—3 L 12.)—Prohibition, (G 21.)*

EXECUTORY DEVISE.

*Vide Devise, (N 16, 17.)*

EXEMPLIFICATION.

*Vide Evidence, (A 2.)—Fine, (G 3.)*

EXEMPTION.

*Vide Challenge, (A 4.)—Dismes, (H 15.)—London, (L 1, &c.)—Prerogative, (D 33.)*

EXIGENT.

*Vide Pleader, (2 W 4.)—Utlagary.*

EXIGENTER.

*Vide Courts, (C 5.)*

EXILE.

*Vide Chancery, (2 M 15.)—Parliament, (H 7.)*



## EX OFFICIO.

*Vide Information, (A 2.)—Visitor, (A 12.)*

## E X O I N E.

## (A) Exoine, or Effoine; the several Kinds.

**A**N *exoine*, or *effoine*, signifies an excuse for non-appearance at the return of process. 2 *Inst.* 125. *Lut.* 861. b.

And it lies in real actions for the demandant, or tenant; or in mixt. 2 *Inst.* 125.

So, in personal actions for the plaintiff, or defendant. *Ibid.*

There are five kinds of effoins. 1. *De Servitio Regis.* 2. *In Terram Sanctam.* 3. *Ultra Mare.* 4. *De Malo Lecti.* 5. The common effoin *De Malo Veniendi.* 2 *Inst.* 125.

In all, except the common effoin, the demandant shall be delayed for a year and a day. 2 *Inst.* 137. 252.

And the party ought to swear to the truth of his effoin; for the *st. Marl.* 19. is to be understood only of the common effoin. 2 *Inst.* 137.

## (B 1.) In what Actions it lies.

**A**N effoin lies, regularly, in all actions real and mixt. 2 *Inst.* 125.

As, in writs of right, and entry.

So, if an assise abates by the *non venue* of the justices, &c.; upon a re-attachment, the tenant may be effoined. 2 *Inst.* 249.

So, upon a re-summons in an assise of *mortd'ancestor.* *Ibid.*

Or, if an assise be adjourned from *Chester*, upon a foreign plea to *C. B.*; for the plea there is not the plea of assise. *Ibid.*

So, tho' the effoin in personal actions was an abuse, yet it was allowed. 2 *Inst.* 125. 1 *Brownl.* 193.

[But now it is held; that an effoin does not lie in personal actions; and if it be cast, the court on motion will quash it. 2 *T. R.* 16.]

## (B 2.) By what Persons.

An effoin, by the common law, was allowed for the demandant or plaintiff, as well as for the tenant or defendant. 2 *Inst.* 125.

So, for the vouchee upon the return of the summons *ad warrantizandum.*

And for the prayee in aid, upon the return of the summons *ad auxiliandum.*

So, the attorney of the tenant or defendant may have the common effoin, but none other. 2 *Inst.* 394.

And if he has two attorneys, one may be effoined without the other; for their power is joint and several.

If the tenant casts an effoin for him and his attorney, it is only surplusage as to one of them. *Hob.* 47.

[An effoin is not allowed to a corporation. 2 *T. R.* 16.]

## (B 3.) At what Time.

An effoin, by the common law, may be cast at every day of appearance.

Before appearance, or afterwards, before plea.

Before issue, or afterwards upon the return of the *venire facias*. *Jur. &c.*

After *voucher*, at the day given for the appearance of the vouchee. *R. Hob. 46.*

At the day given by the roll for the return of the *venire facias*, tho' no *venire* be sued. *Hut. 69.*

But the tenant cannot be effoined after the vouchee has entred into warranty: for the matter is then finished by him with the demandant, and also with the vouchee. *R. Hob. 47.*

So, no effoin shall be after issue in dower. *R. Hut. 69.*

Nor, in any real action upon the return of the *habeas corpora*.

Nor, in personal actions upon return of the *hab. cor.* or *distingas*.

## (B 4.) In what Manner it shall be cast,

In all, except the common effoin, the tenant or defendant ought to swear to the truth of the effoin: for the *stat. Marl. 52 H. 3. 19.* that none *juret pro essonio suo*, extends only to the common effoin. *2 Inst. 137.*

If he be effoined *de servitio regis*, at the day to which it is adjourned, he ought to bring his warrant under the great seal. *Dy. 154. b. Vide post. (E).*

And the effoiner ought to appear in person in court, that he may be sworn, and have a day for his warrant. *2 Inst. 314.*

If the effoin be *de malo lecti*, he shall have two effoiners, one who casts the effoin, the other who swears that he is sick. *2 Inst. 393. Vide post. (E).*

And it shall be cast only at a day certain: for he ought to appear the first day, and cast the effoin the third day. *2 Inst. 393.*

The other effoins ought regularly to be cast on the first day, which is the effoin-day. *Dal. 3.*

And if it be not, a *ne recipiatur* may be entred the next day, which is the day of exceptions.

But if a *ne recipiatur* be not entred, the effoin may be cast on the fourth day of the return.

Yet, to prevent a *ne recipiatur*, it must be entred upon the effoin-day, tho' the writ be not returned till *quartum die post*. *Dal. 3.*

When an effoin is cast, if it be not challenged, day shall be always given to the demandant and tenant, upon the common effoin, at the fifth return after. *Lut. 862.*

And in other effoin, for a year and a day.

If the demandant does not appear at the day to which it is adjourned, he ought to be nonsuited. *R. 2 Vent. 117.*

So, if his attorney does not adjourn the effoin.

The effoin shall be cast between the demandant and tenant, tho' granted in respect of the plea that may arise between tenant and vouchee. *R. Hob. 47.*

## (C) When an Effoin does not lie.

**B**UT, by the common law, an effoin was not allowed in an assise of *novel disseisin*, for the plaintiff or tenant. 2 *Inst.* 249. 418.

Neither was it allowed in *B. R.* for the plaintiff in any assise.

2 *Inst.* 249.

Nor, for the tenant in an assise of *mortd'ancestor*. 2 *Inst.* 249.

By the *stat. W.* 2. 12. an effoin shall not be allowed for the appellant in an appeal of death.

[It does not lie for defendant sued by original, and arrested upon a special *capias*; and tho' it is cast with the clerk, and for want of plaintiff's adjourning it defendant signs a *non prof.*; yet plaintiff may deliver declaration, give rule to plead, call for plea, and for want of it, sign judgment. *Barclay v. Earle*, T. 16 G. 2. *Str.* 1194.]

Neither shall it be allowed for the plaintiff or defendant in a *scire facias*. By the *stat. W.* 2. 45. 2 *Inst.* 470.

Nor, in other judicial writ; as, upon a *grand* or *petit cape*, or *re-summons*. *R. Jon.* 331.

So, by the *stat. W.* 1. 42. in an assise of *mortd'ancestor*, attaint, or *juris utrum*, the tenant shall not be effoined after appearance. 2 *Inst.* 248.; tho' he be only tenant in law; as, a vouchee, &c. 2 *Inst.* 249.

Nor, the demandant. By the *stat. W.* 2. 28. 2 *Inst.* 418.

The tenant or demandant shall not have the common effoin; for every statute, which speaks in general, shall be understood of the common effoin only. 2 *Inst.* 249.

So, an effoin *de servitio regis*, or any other than the common effoin, shall not be allowed in dower. 2 *Inst.* 124.

Nor, in a *quare impedit*, or *darrein presentment*. 2 *Inst.* 124, 125.

So, an effoin *de malo lecti* shall not be allowed in a writ of right in its nature, but in a writ of right only. 2 *Inst.* 394.

Nor, by the *stat. W.* 17. between parceners who claim by the same descent. 2 *Inst.* 393, 394.

So, an effoin shall not be allowed after appearance by attorney, except where the attorney is removed. *R. Carth.* 45.

And if there be a challenge of the effoin in such case, there is no need to say, *quod attornatus non fuit amotus*. *Per Holt*, *Carth.* 48.

[If it appears on the face of the entry, that the effoin was cast by defendant's attorney, it is void. *Anson v. Jefferson*, P. 3 G. 3. 2 *Wilf.* 164.]

## (D) When a Man shall have only one Effoin.

**S**O, by the *stat. Marl.* 52 H. 3. 13. after issue to be tried by inquest, there shall be only one effoin.

And by the *stat. W.* 2. 27. the effoin shall be at the next day.

And therefore, in all personal actions, the defendant, after issue joined by him, to be tried by an inquest, shall have only one effoin, and at the next day of appearance. 1 *Sal.* 216. 454.

Or, if the first process is not served or abates, it may be upon the *alias*; for the first was null.

If the first process was not actually sued, as in the case of a *venire facias*, it shall be at the day given by the roll. *Hut.* 69.

So,



So, in personal actions, if the defendant was effoined before issue, he shall not have any effoin after issue. *Godb.* 235, 6.

So, by the *stat. W.* 1. 3 *Ed.* 1. 43. parceners or joint-tenants cannot fouch; but shall have only one effoin.

And therefore, where each has one effoin after appearance, they cannot afterwards *vicissim effoniare.* 2 *Inst.* 25c.

So, by the *stat. Glo.* 6 *Ed.* 1. 10. husband and wife, after appearance, cannot fouch, *viz.* in real actions. 2 *Inst.* 321.

So, in a personal action against several, they all shall have but one effoin. 1 *Brownl.* 193.

But the plaintiff is not restrained by the *stat. Marl.* or *W.* 2. but that he may have all effoins, at common law. 2 *Inst.* 126.

So, if there are several tenants or defendants, each may have one effoin. 2 *Inst.* 126. 250. *R.* 2 *Vent.* 57.

So, if the defendant or tenant in an inferior court be effoined after issue, and then the plaint is removed, he may have another effoin at the day in bank; for the proceeding before is not of record there. 2 *Inst.* 127.

So, if a prayee in aid, or to be received, after issue be effoined at the day of the return of the summons, he may have another effoin afterwards; for the statute says, *si quis posuerit se in inquisitionem, &c.*

So, if issue be joined not to be tried by an inquest, the defendant shall have another effoin; as, if issue be upon the custom of *London*, which shall be tried by the certificate of the recorder. 2 *Inst.* 126.

So, before appearance, parceners or joint-tenants may have each one effoin; for the *stat. W.* 1. 43. relates to effoins after appearance. *Semb.* 2 *Inst.* 250, 251. 2 *Vent.* 57.

So, if the tenant be effoined after a view, he may afterwards have an effoin in another respect; as, at the day given for the appearance of the vouchee; for the tenant may say, that the vouchee is not the same person. *R. Hob.* 46.

So, in a real action, if the tenant be effoined upon a process, which is of no effect, he may be afterwards effoined; for the first effoin was null; as, if he be effoined upon a summons which was returned *tardè*, wherefore an *alias* summons issued, he may be effoined upon the *alias.* *Dy.* 252. a.

So, if the first summons was not well returned, so as that a *grand cape* might issue by the *stat.* 31 *El.* 3.; by reason whereof an *alias* summons is taken. *R. Hut.* 43. *Jon.* 7.

Tho' the first effoin was adjourned. *Hut.* 43.

So, in a real action, the tenant shall have an effoin after issue, tho' he had an effoin before; for the *stat. Marl.* does not extend to real actions. *R. Godb.* 255, 6.

### (E) The Proceeding after Effoin.

**A**FTER the effoin cast, if all the defendants appear, except him who cast the effoin, the same day shall be given to the other defendants, to which the effoin was adjourned. *Jon.* 331.

If the other defendants do not appear, the same day cannot be given; but there shall be a default, and a re-summons shall be awarded returnable the same day, if they may save their default. *R. Jon.* 331.

If the tenant casts an effoin of *ultra mare*, (which comprehends in *terram sanctam*.) or *de servitio regis*, by the course of the common law, the demandant or plaintiff shall have a writ out of *Chancery*, reciting that the tenant, &c. is not *ultra mare*, &c., and commanding the justices to proceed; whereupon the effoin shall be immediately quashed. 2 *Inst.* 253.

And by the *stat. W.* 1. 44. if the effoin *ultra mare* be adjourned, and the demandant avers by the country that the tenant was within the realm on the day of the summons, and three weeks after, it shall turn to a default.

So, if the demandant or plaintiff, effoined *de servitio regis*, does not bring his warrant under the great seal, testifying that he is in the king's service, he shall be nonsuited. 2 *Inst.* 314.

And it must be by a writ under the great seal, directed to the justices, which testifies his employment in the king's service; which is most commonly done upon a certificate of the captain, under whom he serves, to the chancellor. 2 *Inst.* 314. *Dy.* 154. *b.*

So, if the tenant in a real action does not bring his warrant at the day, it shall turn to a default. 2 *Inst.* 314.

And by the *stat. Gloc.* 6 *Ed.* 1. 8. in personal actions, if the defendant does not bring his warrant, he shall render twenty shillings or more, at the discretion of the justices, to the plaintiff for his journey, and shall be in the king's mercy.

And if it be after issue, the inquest also shall be taken by default. 2 *Inst.* 314.

So, by the common law, if an effoin *de malo lecti* was cast, four knights were returned by the sheriff to inquire *si fuerit languidus*, and if found that he was not, he had 15 days for his appearance; if found that he was, then he should have a year and a day; and before his appearance, there was to be a writ *de licentia surgendi*. 2 *Inst.* 393.

But now, by the *stat. W.* 2. 17. the demandant may insist *quod non est languidus*, and if found by inquest that he is not, it shall turn to a default. 2 *Inst.* 393.

So, in all cases, where an effoin ought not to be allowed, the demandant may challenge it. *Lut.* 862.

If the challenge be for such cause as appears to the court to be true, the effoin shall be adjudged immediately. *Lut.* 862. *b.*

If a demurrer be to the challenge, and the challenge is allowed, it shall be a default in the tenant. *Carth.* 48, 49.

And there shall be judgment against the tenant upon his default without a *petit cape*; for when he has relied upon that matter, by demurring to the challenge, he cannot afterwards have his default; and then the *petit cape* would be vain. *R. Carth.* 48.

But where the party can shew good cause for maintaining his effoin, it shall not be adjudged immediately, but ought to be adjourned. *Lut.* 862. *b.*

And if it be not adjourned, it will be error. *Lut.* 862. *b.*

At the day to which it is adjourned, the tenant may disavow. *Lut.* 865.

Or, may demur to the challenge; and if it be adjudged for him, the plaintiff shall not be nonsuited. *Semb. Hut.* 69.

If it be not adjudged for him, it shall be a default. *R. Lut.* 865.

If

If an essoin be disallowed, when it ought to be granted, it will be error. *Hob.* 47.

Otherwise, if granted when it need not. *Ibid.*

So, if an essoin be adjourned, and judgment at the day given by default, when no essoin was entred, it will be error. *Dy.* 330. a.

Tho' the entry of the essoin be upon the plea roll; if upon a certificate of the essoin roll it appears that no entry was there. *Dy.* 330. a.

*Vide Copyhold, (R 10.)*

### EXPOSITION OF WORDS.

*Vide Agreement (C).—Chancery, (3 A 8.—3 Y 1, &c.)—Covenant, (D 1, 2.—G 2.)—Devise, (N 1, &c.)—Pardon (C—D).—Parliament, (R 10, &c.)—Parols, (A 1, &c.)—Pojar, (B 1, &c.)—Uses, (N 12.)*

### E X T E N T.

*Vide Execution, (B 4, 5.—C 14.)—Statute Staple, (D 5. 7, 8.)*

### EXTINGUISHMENT.

**T**HE deed of a surety does not extinguish the simple contract debt of the principal. *White v. Cuyler, B. R. H. 35 Geo. 3. 6 T. R.* 176.

*Vide Chancery, (4 N 6. 8, 9.)—Common (L).—Confirmation, (D 3.)—Release, (B 6.)—Seigniorie (B).—Suspension (B—C—G).—Uses, (L 6.)*

### E X T O R T I O N.

(A) What shall be.

(A 1.) By the Common Law.

**E**VERY oppression, by colour of justice or right, is extortion. *Co. L. 368. b. Vide Officer (H).*

But the proper signification of the word is, where an officer *colore officii* unlawfully takes money, or other valuable thing from another, which is not due, or more than his due, or before it be due. *Co. L. 368. b. 2 Rol. 263.*

And this was a great misprision and offence by the common law. *Co. L. 368. b. 2 Rol. 263.*

And therefore, by the common law, an indictment or information for extortion lies against an officer who takes a fee *colore officii*, where nothing is due: as, if a judge of an inferior court takes a fee for his judgment. *Semb. per two J. 1 Leo. 295.*

If a sheriff refuses to execute process till his fee be paid. *R. 1 Sal. 330, 331.*



Or, takes a bond for his fee, before execution sued. *R. Hut.* 53.  
 [If a bailiff takes or bargains for money to be paid him by *A.* to accept *A.* and *B.* as bail for *C.* whom he has arrested. *Stotesbury v. Smith, H.* 33 *G.* 2. 2 *B. M.* 924.]

So, if a clerk of a market takes a fee for the view of vessels, &c.; for there may be nothing due. *R. Mo.* 523.

So, if any judge or officer takes more than the usual fee. 2 *Rol.* 263. *Vide Officer*, (*G* 15.)

So, if a ferryman takes more for a ferry than is due by prescription. *Semb.* 4 *Mod.* 101.

If a commissary takes 11 s. 6 d. for absolution, where he ought to have only 2 s. 6 d. 3 *Leo.* 268.

If the judge of an ecclesiastical court takes a fee, &c. for assessing the goods of an intestate to charitable uses, or for commutation of penance, &c. 4 *Inst.* 336. *Vide Administration*, (*B* 8.)

[If the chancellor and register of a diocese compel an executor to prove a will in the bishop's court, knowing it had been proved in the prerogative, and take fees. *Rex v. Loggan, H.* 4 *G. Str.* 73.]

But an indictment or information *contra formam statuti*, where it was an offence only by common law, shall be quashed. 1 *Leo.* 295. 2 *Rol.* 263.

(A 2.) By Statute.

So, by the *stat. W.* 1. 26. *nul viscount ne auter minister le roy ne preigne reward pur faire son office mes sont paies de ceo que ils purnont del roy.* *Vide Mod.* 641.

And this statute, which begins with a sheriff, extends to every inferior minister or officer of the king, whose office concerns the administration or execution of justice, the common good of the subject, or the king's service. as, to an escheator, coroner, &c. 2 *Inst.* 209. *Vide Officer*, (*G* 15.)

To a bailiff, gaoler. 2 *Inst.* 209.

Clerk of a market, aulnager. 2 *Inst.* 209. *Mo.* 523.

So, to the heralds; for they are officers of the king, and were before the statute. *Semb.* 2 *Inst.* 209.

And such officer cannot prescribe to take a fee for doing his office. 2 *Inst.* 210.

So, by the *stat. W.* 1. 30. *lou multz se pleignent des serjeants, criours de fee, & les marsbals des justices in eyre, et dauters justices quelles pernent a tort deniers de ceux queux recoveront, &c. et de fine levie, et des jurors, prisoners, &c. roy defende que cels choses ne soient fuits: et si serjeant de fee le face, office soit prise en main le roy; si marshal, soit punie a volunt le roy; & l'un & l'auter rendra al plaintife treble de ceo quels aver. prise.*

By the *stat.* 3 *G.* 15. if a sheriff, &c. take any sum, &c. for levying a debt to crown, or forbearing to levy it, &c. he shall be guilty of extortion, and being convicted, &c. shall forfeit treble damages and costs to the party aggrieved, and double the sum extorted; to be decreed by the barons in two years after offence, upon complaint in a summary way.

So, if a statute allows a fee to any officer, it will be extortion to take above that which the statute allows. 2 *Inst.* 210. *Co. L.* 368. b. 2 *Rush.* 267.

Or, in any other case. *Co. L.* 368. b.

So,

So, where the *stat.* 11 H. 7. 4. allows a fee to the clerk of the market for sealing, it will be extortion if he takes 1*d.* for his view of vessels, when he does not seal them, nor find them faulty. *R. Mo.* 523.

So, he cannot prescribe to take a fee for the view, when he does not seal them, nor find a defect. *R: Mo.* 523.

So, if the clerk of the crown-office demands 13*s.* 4*d.* for a fee for every defendant who pleads to an information, when it is not due, it will be extortion. *Semb.* 3 *Mod.* 247.

Or, if he take, where several are in the same indictment for the same felony or trespass, above 2*s.* for the *venire* and entry of the plea for all of them. 3 *Inst.* 150. *Vide post.* (E).

So, the chirographer in C. B. shall not take above 4*s.* for making and writing any fine. 3 *Inst.* 150. *Vide post.* (E).

Nor, the auditor in the *Exchequer*, or duchy of *Lancaster*, above 3*s.* 4*d.* for inrolment of a patent, decree, grant, or indenture of lease. 3 *Inst.* 150.

*Vide post.* (E).

### (B) What not.

**B**UT it is no extortion, if an officer takes a fee allowed by statute. 2 *Inst.* 210.

So, it will not be extortion, if a minister or attendant of courts of justice takes such reasonable fees as have been antiently allowed *Co. L.* 368. *b.*

So, a sheriff, &c. may prescribe to take a fee for a thing, which is not an act within his office; as, to take 20*d.* for a bar-fee of every prisoner acquitted; for that is not given for doing his office. 2 *Inst.* 210.

*Vide post.* (D).

### (C) The Penalty for Extortion.

**E**XTORTION is an odious crime, and accompanied with perjury. *Co. L.* 368. *b.*

And the penalty upon a conviction for extortion, by the common law, was fine and imprisonment. *Ibid.*

By the *stat. W.* 1. 26. a sheriff, or other minister of the king, who shall do, &c. shall render double to the party, and shall be punished at the king's pleasure.

And thereon an action lies for the double value.

So, an indictment against several for extortion *colore officiorum* is good; for they might take so much, and afterwards divide it. 3 *Leo.* 268.

An indictment or information for extortion, where nothing is due, ought to say, that nothing was due. *R.* 3 *Leo.* 268.

So, if it was for taking more than was due, it ought to shew how much was due. *Ibid.*

### (D) What Fees are allowed.

**T**HE tables of fees allowed by law or antient usage to the ministers of all the courts of *Westminster*, and to the curfitors, clerks of  
L 4  
allise,

assise, and of the peace, delivered to parliament, *vide annexed to the Complete Attorney*.—[*Vide also the Order of Chancery of 28 Nov. 1743, as to the officers of the court of Chancery.*]

For the fees of clerks, &c. of justices in eyre, *vide the stat. W. 1. 3 Ed. 1. 27. 29. and the stat. W. 2. 13 Ed. 1. 42.*

Of justices of assise, *vide the stat. 13 Ed. 44.*

By the *stat. 27 Ed. 3. 9.* for setting seal to a statute staple shall be paid an halfpenny per pound, or if above 100 *l.* only a farthing per pound.

By the *stat. 12 R. 2. 10.* justices of peace shall have 4*s.* per diem at the sessions, and the clerk 2*s.*—So, 5*s.* to a justice of peace for execution of the *stat. 5 El. 4.*

For fees of the marshalsea, *vide the stat. 2 H. 4. 23.*

By the *stat. 17 Ed. 4. 4.* searchers of tiles may take 1*d.* per 1000 of plain tile,  $\frac{1}{2}$  *d.* per 100 rough,  $\frac{1}{4}$  *d.* gutter tile.

By the *stat. 11 H. 7. 4.* mayor, &c. may take 1*d.* for marking every bushel. *Vide ante, (A 2.)*

By the *stat. 23 H. 8. 5.* commissioners of sewers are allowed 4*s.* per diem, and the clerk 2*s.*

By the *stat. 23 H. 8. 6.* mayor, &c. for recognizance shall take but 3*s.* 4*d.*; the clerk 3*s.* 4*d.*; and for certifying it 20*d.*, on pain of 4*s.* 4*d.*

Fees for grants of the king, *vide the stat. 27. H. 8. 11.*

For inrolment of deeds, *vide the stat. 27 H. 8. 11.*

By the *stat. 5 & 6 Ed. 25.* for the recognizance of an alehouse-keeper shall be taken but 12*d.*

By the *stat. 1 Ph. & M. 12.* not above 4*d.* for impounding a distrefs.

By the *stat. 5 El. 12.* a clerk of the peace shall have 12*d.* for licence of a kيدر, &c., 8*d.* for a recognizance, and 4*d.* for the register.

[The usual fee allowed a bailiff for an arrest is one guinea; and if any one take more, he will be guilty of extortion. 3 *T. R.* 417.]

[The justices of peace in sessions have no authority to fix these fees under *stat. 32 G. 2. c. 28.*; that statute only enables them to regulate the charges for lodging, diet, &c. after the arrest. *Ibid.*]

[By the *stat. 19 Geo. 3. c. 74.* the clerk of assise on each circuit is entitled to receive a certain fee for every person convicted of a transportable offence, (except petty larceny,) and sentenced to transportation, hard labour, or confinement in the house of correction, and for persons capitally convicted, who afterwards have received the king's pardon on condition of being transported or imprisoned. Such fee, on the *Norfolk* circuit, is one guinea. *Fleetwood v. Finch, C. P. M. 34 Geo. 3. 2 H. Bl. 220.*]

### (E) What not.

It is extortion in a collector of *fifteenths* to take 18*d.* from a town for an acquittance. 3 *Inst.* 149.

[Receiver of fee-farm rents can take only 4*d.* for one acquittance (tho' for several years); and, if the party brings the acquittance ready written, he must sign it *gratis*; and if the party tenders his rent, and refuses to pay for the acquittance, receiver cannot distrain for both. *Roberts v. Myddleton, P. 1741, Bumb. 348.*]

In a coroner, to take beyond his fee. *Vide Officer, (G 15.)*

By



By the *stat. M. Ch. 9 H. 3. 26.* nothing shall be taken for inquisition of life or member.

By the *stat. 52 H. 3. 11.* nothing shall be taken for *beau-pleader*;—nor, by the *stat. 17 Car. 2. 6.* for *damage-cleer*.

By the *stat. 4 Ed. 3. 10.* sheriffs and gaolers shall receive felons without fee.

By the *stat. 20 Ed. 3. 1.* justices of the realm shall take no fee, nor robe, but of the king.

By the *stat. 5 R. 2. 16.* the clerk shall take but 2*s.* for making a commission or record of *nisi prius* in the *Exchequer*.

By the *stat. 2 H. 4. 8.* a chirographer, &c. shall not take more than 4*s.* for a fine, on pain of losing his office, suffering a year's imprisonment, and treble damages.—Nor, by the *stat. 5 H. 4. 14.* the 22*d.* for inrolment. *Vide ante*, (A 2.)

By the *stat. 2 H. 4. 10.* the clerk of the crown, tho' many defendants, shall have but one 2*s.* for a *venire facias*, or plea, in felony, or trespass. *Vide ante*, (A 2.)

By the *stat. 23 H. 6. 10.* a sheriff, &c. shall not for an arrest, forbearance to arrest, or bail, take more than 20*d.* to the sheriff, 4*d.* to the bailiff, and 4*d.* to the gaoler for an arrest; 4*d.* for a return of copy of the panel; 4*d.* for bail.

By the *stat. 21 H. 8. 5.* the ordinary, official, &c. shall not take for probate, sealing, registering, inventory making, or other cause concerning a will not above 5*l.* value, so as the same be exhibited in writing with wax ready to be delivered, above 12*d.*; nor above 3*s.* 6*d.* if above 5*l.* and under 40*l.* value; nor above 5*s.* if it exceed 40*l.* value; and nothing for an administration if the goods be under 5*l.*, but 2*s.* 6*d.* if under 40*l.*; and but 1*d.* for a copy of a sheet of 10 lines, on pain of 10*l.*, and the loss of the money taken. *Vide Administration*, (B 8.)

By the *stat. 22 H. 8. 4.* a corporation for entering an apprentice shall take but 2*s.* 6*d.*, and when out of his time but 3*s.* 4*d.*, on pain of 40*l.*

By the *stat. 29 El. 4.* a sheriff, bailiff, &c. shall not take on an execution more than 12*d.* in the pound, if not above 100*l.*; if above, but 6*d.* in the pound, on pain of treble damages and 40*l.*, a moiety to the king, a moiety to the prosecutor; but this shall not extend to fees on execution in a corporation.

[If it appear by the sheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by the statute, the sheriff himself is liable to an action for treble damages at the suit of the party grieved. *Woodgate v. Knatchbull*, B. R. M. 28 G. 3. 2 T. R. 148.]

[*Quare*. Is the sheriff liable to the action at the suit of a common informer? *Ibid.*]

[Under the statute the sheriff can make no charge but for poundage. *Ibid.*]

[*Vide Viscount*, (F 1).]

By the *stat. 1 Jac. 1. 10.* nothing shall be taken on a reference by the courts of *Westminster*, on pain of 10*l.*

It is extortion in a churchwarden to take money *colore officii*.  
1 Sid. 307.

## E Y R E.

Allowance in *Eyre*.*Vide Franchises* (C).Justices in *Eyre*.*Vide Justices*, (E 1, &c.)Justices in *Eyre* of the Forest.*Vide Chase*, (Q 1.)—*Justices* (F).

## F A C T O R.

*Vide Merchant* (B).

## F A C U L T Y.

Court of Faculties.

*Vide Courts*, (N 5.)

## F A I R.

*Vide Market*.

## F A I T.

(A) What is essential to a Deed.

(A 1.) Writing.

[THE rules laid down in respect of the construction of deeds are founded in law, reason, and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. By *Ld. Mansfield Ch. J. Goodtitle v. Bailey*, B. R. E. 17 G. 3. *Cowp.* 600. *Roe v. Tranmer*, C. P. T. 30 & 31 Geo. 2. 2 *Wils.* 75. *Hotham v. East India Company*, B. R. M. 20 Geo. 3. *Doug.* 277.]

[And the province of construing written instruments belongs to the court. *Dough.* 272. 277.]

A deed is a writing containing a contract, and signed, sealed, and delivered by the party. *Co. L.* 35. b.

And therefore, every deed must be wrote on parchment or paper. *Co. L.* 35. b. 2 *Rol.* 21. l. 40.

If it be wrote upon cloth, linen, leather, &c. it is not good. *Co. L.* 35. b. 229. a.

If a blank be signed and sealed, and afterwards written; it is no deed, *Perk. f. 118.*

(A 2.) Sealing.

Seals were used *temp. reg. Edgar*, tho' they were not common in the time of the Saxons. *Co. L. 7. a. Seld. Off. Chan. 3. Dub. Mad. Form. Int. 27. Vide Patent, (C 1, &c.)*

And afterwards, in the time of *Edward the Confessor*, and *William the Conqueror*. *Co. L. 7. a.* For it seems that being used by *Edward the Confessor*, after his residence in *Normandy*, they were introduced into common usage by *William the Conqueror*. *Mad. Form. Int. 27.*

The seal is essential to the deed. *Co. L. 6. a. 7. a.*

[An instrument not under seal cannot operate as a covenant to stand seised to uses. By *Ld. Kenyon Ch. J. Doe v. Staple, B. R. M. 29 Geo. 3. 2 T. R. 695.*]

And therefore, regularly, it is not the deed of him who has not sealed it. *2 Rol. 23. l. 25.*

And, *per scriptum suum* is not sufficient, without saying that it *was sealed*, or *was his deed*. *Vide Pleader, (2 W 9. 14)*

But it is not material with what seal it is sealed; for the seal of a stranger is sufficient. *2 Rol. 23. l. 35. Perk. f. 130. 132. 2 Rol. 22. l. 1.*

And, if twenty seal with the same seal, it is the deed of all. *2 Rol. 23. l. 30. Perk. f. 134.*

[And if a person execute a deed for himself and partner, by the authority of his partner, and in his presence, it is a good execution, tho' sealed only once. *Ball v. Dunsterville, B. R. T. 31 Geo. 3. 4 T. R. 313. Sir W. Jones, 268.*]

And it need not be mentioned in the deed, *sigillum opposui. R. 2 Co. 5. a. 2 Rol. 21. l. 50. 22. l. 3.*

And if a corporation seals, there is no need to say, *sigillum nostrum commune. 2 Rol. 21. l. 45.*

Before the Conquest, and since, till the time of *Rich. 1.* the king's seal was not arms, but any impression varying at the king's pleasure. *Co. L. 7. a. 2 Rol. 180. a. Vide Patent, (C 1.)*

*Rich. 1.* first used two lions rampant, combatant. *Co. L. 7. a. 2 Rol. 181. l. 25.*

And after his return from *Jerusalem*, three lions passant. *2 Rol. 181. l. 25.*; but *Coke* says *K. John* first used them. *Co. L. 7. a.*

So, if an indenture be between *A.* of the one part, and *B.* and *C.* of the other; whereby *A.* demises to *B.* and *C.* who covenant with *A.* If *B.* seals the counterpart, but *C.* does not seal, yet if *C.* agreed to the lease, it shall be his deed, and he shall be bound by the covenants. *Co. L. 231. a. Vide post. (C 2.)*

So, if there are mutual covenants between *A.* and *B.* of the one part, and *C.* and *D.* on the other, and *B.* does not seal; yet covenant lies by him, against *C.* and *D.* upon this deed. *R. 2 Rol. 22. l. 35.* For he is named a party to the deed, and *C.* and *D.* covenant with him.

(A 3.) Delivery.

(A 3.) *What shall be a delivery, when a second delivery avails.* So, delivery



delivery is essential to a deed; for it is not a deed without delivery, tho' it be sealed. *Co. L. 35. b. 2 Rol. 23. l. 40. 45. Vide post (B 5.)*

But a delivery may be made without any words; as, if he actually delivers a writing, after sealing it, to the party, without saying any thing. *Co. L. 36. a. 2 Rol. 24. l. 28. 45. Per two J. Dal. 104.*

If he throws it upon the table, with an intent that the party shall take it; and he takes it accordingly. *R. Ow. 95.*

If he delivers it as his deed into the hands of a stranger. *2 Rol. 24. l. 42.*

If it be wrote in a book, and he delivers the book. *2 Rol. 25. l. 20.*

[No particular mode of delivery is necessary; for it is sufficient if the party, executing a deed, treat it as his own. *Ball v. Dunsterville, B. R. T. 31 Geo. 3. 4 T. R. 314*]

If a deed be to *A.* for the benefit of *B.* upon a marriage, a delivery to *B.* upon the day of marriage, saying, *this will serve*, and *B.* delivers it to *A.*, shall be a good delivery to *A.* *R. Dy. 192. b. 2 Rol. 24. l. 15.*

So, a delivery may be by words only, without an actual delivery; as, if the writing lies upon the table, and the obligor says to the obligee, *take it up, it is sufficient for you.* *Co. L. 36. a.*

Or, *take it as my deed.* *Ibid.*

So, if it be once delivered as his deed, it is sufficient, tho' he afterwards by words explains his intent otherwise; as, if an obligation be made to *A.*, and delivered to *A.* himself as an escrow, to be his deed upon performance of a condition; this is an absolute delivery, and the subsequent words are void and repugnant. *Dub. Dy. 34. b. Cont. Cro. El. 835. R. acc. Cro. El. 520. 884. Mo. 642. Semb. cont. Mo. 697. 27 H. 8. 12. b. Acc. 19 H. 8. 8. a. R. acc. Hob. 246. 2 Rol. 26. l. 45. R. 9 Co. 137. Co. L. 36. a. R. Noy, 6.*

If it be delivered as his deed, to a stranger, to be delivered to the party upon performance of a condition, it shall be his deed presently; and if the party obtains it, he may sue before the condition performed. *2 Rol. 25. l. 30. R. per three J. 1 Leo. 152.*

So, a common seal fixed to the deed of a corporation is tantamount to a delivery. *R. 2 Rol. 23. l. 50. Dav. 44. b.*

So, a delivery by a stranger, with the assent of the maker of the deed, is sufficient. *Perk. Fait, 137.*

(A 4.) *What not.*] But if a man throws a writing on a table, and says nothing, and the party takes it; this does not amount to a delivery, unless it be found to be put there with intent to be delivered to the party. *R. 1 Leo. 140. Ow. 95.*

So, if he delivers a writing to *A.* to the use of *B.*, it is not a delivery to *B.*, if it was not delivered as his deed. *2 Rol. 24. l. 39.*

So, if an obligation made to two be delivered but to one, without saying any thing, this will not avail as to the other. *2 Rol. 24. l. 12.*

So, if a lease and letter of attorney be fixed together, and a delivery be of the letter of attorney only; this does not amount to a delivery of the lease, tho' it be actually put with the letter of attorney into the hands of the party. *R. 2 Rol. 25. l. 5.*

So

So, if it be delivered to a stranger as an escrow, to be his deed upon performance of conditions; it is not his deed till the conditions performed, tho' the party happens to have it before. 2 *Rol.* 25. l. 25. 45. *Co. L.* 36. a.

Or, be delivered to a stranger to keep till conditions be performed. 2 *Rol.* 25. l. 40.

Or, to be delivered to the party, as his deed, upon performance of a condition.

But a delivery cannot be to the obligee, as an escrow. 2 *Cro.* 85, 6.

So, a deed by a corporation out of possession, containing a lease of land and letter of attorney, is not good under the common seal, if the attorney does not deliver it upon the land. *R.* 2 *Rol.* 24. l. 5. *R.* 1 *Vent.* 257.

### (B) What is not essential.

#### (B 1.) The Name of the Party.

**I**T is not essential to a deed that the party subscribe his name. 2 *Cro.* 640. *Vide post.* (E 30.)—*Vide Capacity*, (B 4, 5.)—*Grant*, (A 2.)

And therefore, a variance in the name subscribed from the name of the defendant, does not prejudice, if it be found that the defendant executed it; as, if the defendant be *R. Erlin*, and subscribed his name *Erlwin*. *R. Sal.* 462.

#### (B 2.) Reading.

So, it is not necessary that the deed be read before sealing and delivery; for if the party executes it without hearing, or desiring that it may be read, yet it binds him. *Dub.* 44 *Ed.* 3. 23. a. 44 *Aff.* 30. 2 *Rol.* 28. l. 15. *Mo.* 184. 2 *Co.* 9. b.

But an illiterate man need not execute a deed before it be read to him. *R.* 2 *Co.* 3. *Manser.* *R.* 2 *Co.* 9.

Or, if it be in *Latin*, &c. before it be read to him in a language which he understands. 2 *Co.* 9.

So, a blind man, tho' he be well learned. 11 *Co.* 28. a.

So, if it be agreed to execute a release of a trespass, and the party, instead of it, executes a release of the land; it does not bind him. 44 *Ed.* 3. 23. 44 *Aff.* 30.

Or, if he executes a general release. 2 *Rol.* 28. l. 10.

So, if an illiterate man executes a deed which is falsely read, or the sense declared different from the truth, it does not bind him. *Adm.* 9 *H.* 6. 59. b. 2 *Rol.* 28. l. 5. *R.* 2 *Co.* 9. b. *Mo.* 148. 184.

As, if it be read to be upon a condition, when it was absolute. 2 *Rol.* 28. l. 25.

Or, to be of 5 *l.* penalty, when it was of 10 *l.* 2 *Rol.* 28. l. 32. 11 *Co.* 27. b.

Or, to be a gift in tail, when it was a feoffment. 2 *Rol.* 28. l. 27.

So, it does not bind if the false reading be by a stranger, any more than if by the party to whom the deed is given. *R.* 2 *Co.* 9. b.

So, tho' it be by a friend of him who executes it, without covin. *R.* 2 *Co.* 9. b.

So,

So, if a man lettered, blind by age, &c. executes a deed falsely read, it does not bind him. *R. 2 Rol. 28. l. 20.*

If a feoffment, with letter of attorney, is falsely read; it is void for both. *2 Rol. 28. l. 27. 11 Co. 27. b.*

But if two deeds are on the same parchment, and the one is truly read, and the other falsely; it binds for the deed which was truly read. *2 Rol. 28. l. 35. 37. 11 Co. 27. b.*

So, if there are two distinct clauses in the same deed, and one is truly read, and the other not, it shall be good as to the one. *11 Co. 27. b.*

(B 3.) Date.

So, the date is not essential to a deed; for it has no date, or a false or impossible date, the deed shall be good, and shall take effect from the time of the delivery. *Co. L. 6. a. R. 2 Co. 5. a. 2 Rol. 21. l. 41. P. 2. 3 Leo. 100. Kelv. 34. b. R. Yel. 193. Vide Mad. Form. Int. 30.*

So, if it has the day of the month, but no year is mentioned; for that is a void date. *2 Rol. 27. l. 22.*

So, if the delivery be found before or after the date, the deed shall be good; for tho' the party is estopped to plead the deed to be delivered before the date, yet the jury may say the truth. *R. 2 Co. 4. b. 3 Leo. 100.*

So, where a deed has a void date, it may be pleaded, that it was delivered at some other day than that mentioned in the deed. *2 Rol. 27. l. 25. Yel. 194.*

So, if it be delivered after the date, it may be pleaded, *quod per fact. geren. dat. 1 Maii & primo deliberat. 9 Maii.* *R. 3 Lev. 348. R. Cro. El. 890.*

So, a deed with the day of the month, and year of the king, shall be good, tho' *A. D.* be mistaken. *Mod. Ca. 45.*

So, if the year of the king be mistaken. *R. Sal. 462, 3.*

So, the clause *in cujus rei testimonium* is not necessary. *Co. L. 6. R. 1 Leo. 25.*

[If two deeds bear date the same day, and are manifestly but one agreement, that shall be presumed to be executed first, which will support the clear intent of the parties, in a family-settlement for a valuable consideration. *Taylor v. Horde, H. 30 G. 2. 1 B. M. 60.*]

(B 4.) Witnesses.

So witnesses are not essential to a deed.

Tho' the clause of *hiis testibus*, continued in the deeds of subjects till the time of *H. 8.* *2 Inst. 78.*

And was used in the king's patents, *temp. H. 3. Ed. 1, 2, and 3.* and before. *2 Inst. 77. Vide Patent (B).*

(B 5.) When a second Delivery renders a Deed effectual.

If a deed be entirely void at the time of delivery, for want of capacity in him who makes it, and afterwards the same person attains capacity to make it, and then delivers the deed *de novo*, the second delivery makes it good; as, if a *feme-covert* delivers a deed, and after the



the death of her husband delivers it *de novo*. *Vide Capacity*, (D 2.)—*Vide ante*, (A 3.)

So, if a deed be cancelled, and afterwards executed and delivered *de novo*, it shall be good. 2 *Roll.* 26. l. 7.

So, if a man who has a capacity to make a deed, but for some impediment cannot at that time make it effectual, delivers the deed as an escrow, to be afterwards delivered as his deed, and after the impediment removed, it be delivered as his deed; it shall be good; as, if a disseisee makes a lease for years, being out of possession, and delivers the deed as an escrow, to be afterwards delivered as his deed, and after possession obtained it be delivered as his deed; it shall be good. *Co. L.* 48. b. *Cro. El.* 446. 3 *Co.* 35. b.

But if a man delivers a deed as his deed, and at the time of the delivery has not power to make it effectual, it shall not be good by a second delivery after the impediment removed; as, if a disseisee makes a lease, being out of possession, and delivers it as his deed, it cannot be a good lease by a new delivery after the possession recovered.

So, if a deed of confirmation of the estate of the lessee be delivered before a lease executed; it cannot be good by a delivery *de novo* after a lease made.

So, if a man who has not capacity to make a deed, delivers it as an escrow to be afterwards delivered as his deed, and afterwards attains a capacity, and then the deed is delivered; it shall not be good, for this relates to the first delivery; as, if an infant, *feme-covert*, &c. delivers a deed as an escrow, and after full age, death of the husband, &c. it is delivered as a deed. *R. Cro. El.* 446. 3 *Co.* 35.

So, if it was delivered at first as his deed, by one whose deed is not void, but voidable only; as, by an infant, by dures, &c. it shall not be good by delivery *de novo* at full age, when at large, &c. 2 *Roll.* 26. l. 10. 15.

### (C 1.) Deed indented.

EVERY deed is indented, or poll.

When a deed is indented, it shall be said to be an indenture, tho' the words, *this indenture*, &c. are wanting. *Co. L.* 229. a. 2 *Inst.* 672. *R.* 5 *Co.* 20. b.

But the words, *this indenture*, &c. do not make an indenture, if the deed be not indented. *Co. L.* 229. a. 143. b.

Indented deeds began to be used *temp. R.* 1 *John*, or *H.* 2. and were common *temp. H.* 3. *Mad. Form. Int.* 29.

An indenture may be indented at the top or side. *Co. L.* 229. a.

An indenture is bipartite, tripartite, quadrupartite, &c. *Co. L.* 229. a.

And every part of the indenture is of as great effect as all the parts together. *Lit. f.* 370.

And all the parts are but one deed in law. *Lit. f.* 370.

### (C 2.) Who are Parties to it.

If one party executes his part of an indenture, it shall be his deed, tho' the other does not execute his part. *R. Cro. El.* 212. *Co. L.* 229. a. *Vide post.* (D 2.)

So, if an indenture be between *A.* and *B.* of the one part, and *C.* and *D.* of the other, whereby an estate is granted to *C.* and *D.*, and there are covenants to *A.* and *B.* by them; tho' *D.* does not seal, if he agrees to the deed, he shall be bound by the covenants. *Vide ante*, (A 2.)

So, tho' *B.* does not seal, *A.* and *B.* may have covenant; for *B.* is named a party. *Vide ante*, (A 2.)

So, if a deed between *A.* on the part of *B.* of the one part, and *C.* of the other, and *C.* agrees to pay so much to *B.*, without saying with whom he agrees; *B.*, tho' a stranger, may maintain an action thereon against *C.* *Dub.* 3 *Lev.* 139.

So, if a deed does not mention any parties in the beginning, but says, *it is agreed, that a horse shall run, &c.* In witness whereof we have set our hands and seals, and *A.* and *B.* sign and seal it; they are parties to it, and the one shall have covenant against the other. *R.* 1 *Sal.* 214.

So, if a deed be between *A.* and *B.*, whereby it is agreed that *D.* shall do all on his part, and *D.* seals and delivers it, he is a party; and if he does not do all agreed on, covenant lies against the covenantor. *Semb. Sho.* 59.

So, if a demise be by *A.* to *B.*, by deed between *A.* and *B.*, and afterwards *C.* adds; that he covenants that *B.* shall pay his rent, &c. and signs the deed; covenant lies against *C.*, tho' he was not a party to the original deed. *R.* *Carth.* 76.

But if a charter-party be between *A.* and other owners of a ship, of which *B.* is master of the one part, and *C.* of the other, whereby *A.* covenants with *B.* and *C.*, and also *C.* covenants with *A.* and *B.*; tho' *B.* executes the deed, yet he is not a party, and cannot release covenant by *A.* against *C.* *R.* 2 *Roll.* 22. l. 20.

So, a man cannot be party to a deed, if he be not named therein; as, if it be agreed between *A.* and *B.*, that *A.*, being arrested, shall go at large upon his note, whereby he writes, *I engage to return to the custody of D. such a day*; *B.* is not a party, nor can have covenant upon this note, tho' it be signed and sealed by *A.* *R.* 1 *Sal.* 197.

### (D 1.) Deed Poll.

**A** Deed poll is every deed not indented. *Co. L.* 229. a.

And if a deed is pleaded, it shall be intended to be poll, if it be not mentioned to be indented. *Co. L.* 229. a.

If a deed poll between *A.* and *B.* be delivered by *A.* to *B.*, and afterwards delivered by *B.* to *A.*, either of them who has it in his hands may maintain an action thereon; for the re-delivery does not avoid the deed. *R.* *Cro. El.* 483.

So, if *A.* by deed poll agrees to pay so much to *B.*, he shall maintain an action upon it, tho' he be a stranger, and did not seal it. 3 *Lev.* 140.

### (D 2.) Who shall take, tho' not a Party.

None shall take a present interest by a deed, if he be not a party to it. *Co. L.* 231. a. *Vide ante*, (C 2.)

So, a party to a deed cannot covenant with one who is a stranger to the deed. *Per Holt, Carth.* 76.

But

But a man may take by way of remainder, tho' he be not a party to the deed. *Co. L. 231. a.*

As, if by deed between *A.* and *B.* only, *A.* conveys to *B.* for life, or in tail, remainder to *D.* for life, in tail, or in fee; *D.* shall take the remainder, tho' he be a stranger to the deed. *Ibid.*

So, if a lease be to *B.* for years if *A.* so long lives, and that it remain to *D.* for years, to commence after the death of *A.*; it shall be a good remainder to *D.*, tho' no party. *R. Ray. 142.*

### (E) The Parts of a Deed.

#### (E 1.) Recital.

**A** Deed may be good, tho' it has not formal parts.

A recital is not an essential part of a deed; for it may explain the intent, or may be repugnant. *Per Holt, 3 Ca. Ch. 101.*

#### (E 2.) Indorsement, &c.

A thing subscribed after the words, *in cujus rei testimonium*, or indorsed, may amount to a covenant or defeazance; but is no part of the deed: as, if a bill or note for 10*l.* be subscribed, *memorandum, that he is not to pay the 10 l. till he has recovered, &c.* *R. 2 Brownl. 98.*

So, a thing wrote after, *in cujus rei testimonium* is no part of the deed, tho' it was wrote before the sealing and delivery of the deed. *2 Rol. 23. l. 20. R. cont. Mo. 3.*

But if words are wrote upon the back for want of room within the parchment, they shall be part of the deed. *2 Rol. 22. l. 47.*

So, if a condition be indorsed upon an obligation, &c. it shall be good; for it goes in defeazance. *2 Rol. 22. l. 50.*

So, if under the condition words are wrote, and that *they shall be parcel of the condition*; this makes the words part of the condition. *2 Rol. 23. l. 15.*

So, if there be a memorandum wrote under, that *the sum in the condition shall not be paid till such a contingency, without more.* *R. 2 Rol. 23. l. 5.*

Or, a memorandum indorsed. *R. Mo. 679.*

[A receipt is not *conclusive* evidence against the party who signs it. *Straton v. Raftall, B. R. E. 28 Geo. 3. 2 T. R. 366.*]

#### (E 3.) The Premises.

(E 3.) *When the parties are well described.*] The office of the premises of a deed is to ascertain the parties, and the lands, &c. conveyed. *Co. L. 6. a.*

The proper description of the party is by his Christian and surname. *Vide Capacity, (B 4, 5.)—Vide ante, (B 1.)—Grant, (A 2.)*

So, he may be described by his name of office, or dignity.

So, if a man executes a deed, and his addition be mistaken, this shall not avoid the deed; as, if *A. B. junior* executes an obligation by the name of *A. B. senior.* *R. 13 H. 4. 4. b. 2 Rol. 21. l. 15.*

So, if his surname be mistaken; as, *A. Bosom*, for *A. Bozom.* *14 H. 4. 30. b. 2 Rol. 21. l. 19.*

Or, if it be totally different; for a man may have two surnames. *3 H. 6. 25. b.*

So, if a deed be executed by *A.*, and subscribed by his Christian and  
VOL. IV. M surname,



urname, but in the ingrossing his Christian name is left blank, yet it shall be good. *R. 2 Cro. 261.*

So, if a man be baptized by one name, and known by another, a grant by the name by which he is known shall be good. *2 Rol. 43. b.*

So, if *Jane B.* makes a lease by the name of *Joan*, it shall be good. *R. 2 Rol. 42. l. 50.*

But if *Edmund* executes a deed in which he is named *Edward*, and he be sued by the name of *Edmund, alias dict. Edward, &c.* he may plead *non est factum*, and shall avoid the deed. *R. 3 H. 6. 25. Per Prisot, 34 H. 6. 19. b. 2 Rol. 21. l. 21. R. Dy. 279. b. Ow. 48. R. Cro. El. 897. R. 2 Cro. 558. 640.*

Tho' he subscribes by his true name, *Edmund. R. 2 Cro. 640.*

Tho' the jury find that *Edmund* executed the deed. *Ibid.*

So, if he be sued by the name of *Edward*, when his name was *Edmund*; for he may plead *non est factum*, tho' in fact he executed the deed. *Cont. Dy. 279. b.* but that is denied *ibidem in marg.*

So, if a man takes solely by the deed, a mistake of the title, or addition to the party, shall avoid the deed; as, if a grant be to *A. B.*, knight, where he is not a knight. *2 Rol. 43. l. 30.*

Or, to *A. B. esquire*, where he was a knight. *R. per three J. Rookby cont. Sal. 561.*

Yet if *Edmund* executes a deed in which he is named *Edward*, and is sued by the name of *Edward*, and pleads misnomer; he may be estopped by the deed. *Per two J. Dy. 279. b. in marg.*

(E 4.) *When the lands are well described. By what names they pass.]* The premises ought to comprehend the certainty of the lands or tenements to be conveyed. *Co. L. 6. a. Vide Grant, (E 1, &c.)*

*Land* is *nomen generalissimum*, and comprehends all the species of land. *Co. L. 4. a. Vide Grant, (E 3.)*

[A nominal manor will pass under the general words, messuages, lands, tenements, and hereditaments. *Norris v. Leneve, P. 1744, 3 Atkyns, 82.*]

If a man possessed of a term for years, by indenture, reciting the term, grants all the said lands to *A.*, his executors and assigns; the whole term passes, without more. *R. Skin. 542.*

If the description of the tenements granted comprehends several particulars and circumstances in the same sentence, all ought to be true, otherwise the grant will be void; as, if a man conveys all his tenements *in the parish of B.*, *in the tenure of A.*, if they are not in the parish of *B.*, tho' they are in the tenure of *A.*, they do not pass. *R. 3 Co. 10. a. Doughty. R. Dy. 292. b.*

So, if he conveys all his tenements *in the tenure of A.*, *in the parish of B.*; for it is not material that the first part of the description is true, if the whole is not so. *R. 2 Co. 33. a. D. cont. 3 Co. 10. a. Acc. Hob. 171.*

So, *a fortiori*, if he conveys *omnia messuagia, terras, tenementa in tenura A. B., &c. in W.*, when they are in *D.*; for *illa* refers to the whole period. *R. 2 Co. 33. a.*

*Totam illam portionem decimarum in L. cum omnibus decimis in L. in tenura J. C.*, when he has not any portion, and the other tithes in *L.* were not in the tenure of *J. C.* *R. 4 Co. 35.*

If

If he conveys the manor of *D.* in the county of *B.*, by bargain and sale, when it lies in the county of *O.* *R. Dy. 292. b. in marg.*

But if the thing described is sufficiently ascertained, it is sufficient, tho' all the particulars are not true; as, if a man conveys his house in *D.*, which was *R. Cotton's*, when it was *Thomas Cotton's*. *Hob. 171.*

Or, his house late *R. Cotton's* in *D.* *R. Dy. 376. b.*

If he demises the manor of *D.*, which manor is in lease for such a rent; the demise is good, tho' the rent be mistaken. *Per Poph.*

*2 Cro. 34.*

Or, a meadow in the parish of *D. in com. B.*, tho' it was in *com. W.* *R. Dy. 292. b.*

Or, the manor of *D. in com. B.*, when it was in *com. O.*, if livery be made. *Dy. 292. b. in marg.*

Or, the commandry of *S. in com. R.*, tho' it be not in *com. R.* *Cro. El. 114.*

So, if he demises the tythes of 78 acres, and all tythes prædial and personal belonging to the prior, &c. all which were in lease to *M.*, the tythes pass, tho' not in lease; for there was a sufficient certainty before, and therefore the words, all which, &c. shall be taken as an explanation, and not as a restriction. *R. Cro. Car. 584.*

If he demises his meadows in *B.* and *D.*, containing 10 acres, where they contain 20 acres; all the meadows pass. *Semb. Sav. 114.*

[By a grant of all tythes arising out of or in respect of farms, lands, &c. the tythes arising out of and in respect of rights of common appurtenant to such farms or lands, will pass. *Gwydir v. Foakes, B. R. E. 38 Geo. 3. 7 T. R. 641.*]

#### (E 5.) Exception.

(E 5.) *By what words.*] If a man makes a grant, he may make an exception out of the generality of the grant, by the words, *exceptis, salvo, præter, &c.* *Co. L. 47. a.*

So, by the word, *reserving*, which has the force of an exception, or saving, sometimes. *Co. L. 143. a.*

So, an exception may be added, after a limitation of an use. *R. Cro. Car. 437. Jen. 396.*

(E 6.) *The effect of an exception.*] *Si quis rem dat & partem retinet, illa pars, quam retinet, semper cum eo est, & semper fuit.* *Co. L. 47. a.*

And therefore, if *A.* leases a tenement reserving a house *pro proprio usu & occupatione*; the house is wholly in the lessor, and not demised. *4 Mod. 11.*

So, if the exception be, *for the use of the lessor when he pleases to reside there, and at other times for the use of the lessee*; the house is wholly excepted out of the demise, tho' the latter words make the lessee tenant at will. *R. 4 Mod. 12. Sho. 311.*

If a man lets his manor, *exceptis boscis*, the soil shall be excepted. *Dub. Dy. 19. a. R. 5 Co. 11. Cro. El. 522. 2 Rol. 455. l. 15.*

So, if it be, *except woods, underwoods, coppices, &c. standing and growing upon the manor, with liberty of ingress, saving for the botes of the lessee*, who covenants to make fences, except to new coppices; for upon the whole lease it appears, that the intent was to except the soil. *R. 2 Rol. 455. l. 20. 2 Cro. 487. Vide post. (E 7.)*

(E 7.) *When it shall be void.*] But an exception of a thing not *in esse*, or not contained in the demise, is void. *Co. L. 47. a. 143. a.*

As, if a lessee for years assigns his whole term, *except the trees, mines, &c.* it will be a void exception; for they were not in his power. *5 Co. 12. b. Cro. El. 522. R. 2 Rol. 454. l. ult.*

But if a lessee for life or years makes an under-lease, *except the trees*, it will be a good exception; for he may have trespasses for cutting them down, and is subject to waste if they are cut down. *R. 2 Rol. 454. l. 42. 45.*

So, an exception of a thing certain, out of a thing particular and certain, will be void; as, if a man leases 20 acres, *excepting one acre*, the exception is void. *Co. L. 47. a.*

So, if he grants a piscary, saving *piscaria sua*. *2 Rol. 454. l. 2.*

So, if he leases a house and shops, *except the shops*. *2 Rol. 454. l. 27. Dy. 264. b.*

If he leases a parsonage with all lands, underwoods, &c. *except great trees, wood, and timber*; it shall be void as to the underwood. *R. 2 Rol. 454. l. 25. Hob. 170.*

If he grants the manor of *B.*, with all lands reputed parcel thereof, and occupied therewith, *except the manor of C.*: if *Whiteacre* be reputed parcel of *B.*, and occupied with it, tho' in truth it be parcel of the manor of *C.*, it shall not be excepted; for it was expressly granted before. *R. 2 Rol. 454. l. 30.*

If he grants his manor, *except the demesnes, or services*. *Hob. 170.*

Or, except wards, marriages, reliefs, and courts, in a grant by a subject. *R. 2 Cro. 176.*

So, if a man grants *totum statum & interesse suum*, *except the moiety*; it shall be void. *2 Rol. 455. l. 1.*

Or, assigns his whole term, except to himself for his life; for it is repugnant. *2 Rol. 455. l. 5.*

So, an exception of the whole contained in the grant, &c. shall be void; as, if *A.* releases all his right to such land, *except that which he has by descent*, when he has the whole by descent; the exception is contradictory and void. *R. 2 Rol. 454. l. 5.*

So, if he demises all his land in *B.*, *except Whiteacre*, when he has nothing but *Whiteacre*. *R. 2 Rol. 454. l. 20. Hob. 170.*

Or, all his house, *except such a chamber*, when he has nothing but the chamber. *Semb. 2 Rol. 454. l. 10.*

Or, all his land in *A.*, *prater his manor of B.*, and he has nothing in *A.* but that manor. *2 Rol. 454. l. 40. Hob. 170.*

So, an exception out of an exception leaves the thing unexcepted.

So, words added to an exception may qualify the force of the words, and explain the intent of the exception; as, if a man leases land, *except his wood, viz. oak, ash, and crab-trees, &c.* the foil is not excepted. *Semb. 2 Rol. 455. l. 10.*

(E 8.) *How it shall be construed.*] Every exception is the act and words of the lessor, grantor, &c., and therefore shall be taken *strictè* against him. *10 Co. 106. b.*

#### (E 9.) The *Habendum*.

The office of the *habendum* is to name the grantee, and limit the certainty of the estate. *Co. L. 6. a. 2 Rol. 65. l. 25. 9 Co. 47. b.*

As,



As, if a man grants land to *A. habendum eidem A. & heredibus suis*, or, *heredibus de corpore suo*, or, *pro termino vite, vel annorum*;

And if a limitation be to *A., habendum* to the use of him and the heirs of his body, it will be a good estate-tail; for it does not operate by way of use, but as a limitation at common law. *R. Cro. Car. 231. 245.*

So, the *habendum* may abridge or alter the generality of the premises. *Hob. 171.*

As, if a reversioner after three lives grants his estate to *A.* for life, *habendum* for life when the three lives expire; it will be a good grant of the reversion for life. *Hob. 171.*

So, if a grant be to two, *habendum* to the one for life, and after his death to the other in fee; the one shall take for life, remainder to the other. *R. 8 Ed. 3. 59. b. 2 Co. 55. b. Pl. Com. 153. cont. but 160. accord. acc. Hob. 172. Dy. 126. b.*

If a grant be to two jointly, the *habendum* may limit a moiety to the one, and a moiety to the other; by which they shall be tenants in common. *Co. L. 183. b. Cont. Pl. Com. 153. but acc. 160. a. Vide Estates, (K 2.)*

So, a grant may be to three, *habendum* to one for life, remainder to another for life, remainder to the third for life, *successive*. *2 Rol. 65. l. 50. R. Dy. 160. b. Per two J. Mo. 25. R. Dy. 361.*

So, a grant to *A., habendum* to him and his wife for their lives *successive*, will be a good remainder to the wife. *R. 2 Cro. 372. R. 2 Cro. 564.*

So, if a grant or feoffment be to *A.* and his wife, and their heirs, *habendum* to them and the heirs of their bodies, without more; they have an estate-tail, with a remainder expectant in fee. *R. 2 Rol. 19. 23.* But said, that it shall be only an estate-tail, without a remainder in fee expectant; for the *habendum* abridges the generality of the premises. *Co. L. 21. a. 8 Co. 154. b.*

So, a grant of rent to *A.* and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of *B.*, he shall have only a descendible freehold. *R. Mo. 876.*

So, where no estate is expressed in the premises, the *habendum* may frustrate and make it void; as, if a feoffment be to *A. habendum*, after the death of the grantor, for life; the *habendum* makes the feoffment void; for a freehold cannot commence *in futuro*. *2 Rol. 66. l. 5. Hob. 171. Skin. 544.*

(E 10.) *Shall not be repugnant.*] But if the *habendum* be repugnant to the premises, it shall be void; as, if a grant be of all his term, *habendum* after his death; the *habendum* will be void. *Hob. 171. R. Dy. 272. a.*

Or, of all his lands, to the grantee, his executors and administrators; for this passes the term. *R. 1 Sal. 346. Skin. 542.*

If a grant be by the premises to *A.* and his heirs, *habendum* after his death to *A.* and the heirs of his body; *A.* shall take immediately; for a freehold *in futuro* cannot be; and therefore the *habendum*, being repugnant to the premises, shall be void. *R. 3 Lev. 339.*

So, the *habendum* cannot enlarge the premises; and therefore, if *A.* leases land to *B.* for years, *habendum* to *B.* and *C.* for life, nothing passes to *C.*, nor shall *B.* have an estate but for his own life. *Jon. 310.*

## (F) When a Deed shall be avoided.

(F 1.) By Razure, Interlineation, &amp;c.

**B**UT if a deed after execution be altered in a material place by razure, interlineation, addition, &c. by the obligee himself, it shall be void; and the obligor may plead *non est factum*. R. 11 Co. 27. *Pigot.*

As, if it be altered in the name of the obligor, or obligee, or sum, &c. 11 Co. 27. a.

Or, by the addition of a Christian name, or addition of the obligor, R. Cro. El. 626.

Or, by the addition of a condition for the advantage of the obligor, *Ibid.*

So, if he makes a lease agreeable to the counterpart, by increase of the rent. R. Cro. El. 627.

So, if he erases part of the land demised. R. Mo. 35.

So, if a word be dashed thro' with a pen, tho' it be legible, 11 Co. 27. a.

So, a deed shall be void, if it be altered in a material place by a stranger, without the privity of the obligee. R. 11 Co. 27. a.; but this seems, *per two* J. understood to be, in a place so material that it cannot be sued. 1 Rol. 40. R. Cro. El. 626. Mo. 10.

Tho' it be before the obligee had notice of the execution of the deed. R. Cro. El. 627.

So, if it be altered by the obligee himself, tho' it be in a place not material. 11 Co. 27. a.

As, by the addition of a date, Cro. El. 800.

So, by razure, &c. the whole deed shall be void. 11 Co. 28. b.

Tho' it contains several distinct covenants, or clauses; and the razure be only in one. 11 Co. 28. b.

But if the alteration be by the obligor himself, in a place not material, the deed shall not be void; as, if it be an addition to the name of the obligee. 11 Co. 27. a.

So, an alteration by a stranger, in a place not material, without the privity of the obligee, does not avoid the deed. R. 11 Co. 27. a. 1 Rol. 40.

Or, if it does not appear, by the pleadings, to be material. 1 Rol. 40.

Nor, an alteration by the executor of the obligee, in a place not material, and which tends to the benefit of the obligor. R. 1 Leo. 282.

So, an alteration by the obligor himself, in a material place, does not avoid the deed. 11 Co. 27.

So, if a material alteration be by consent of the obligor and obligee, it does not avoid the deed; as, if the name of another obligor be interlined, and he executes the deed. R. 2 Lev. 35.

Or, upon an agreement between them that an addition shall be made after the deed sealed. *Per Popb.* Cro. El. 617.

(F 2.) By breaking off the Seal.

So, if the seal of any deed be broken off, the deed shall be void,

So, tho' it be broken off by a stranger. 5 Co. 23. a. 1 Rol. 40.

Or,

Or, destroyed by mice, before plea. 1 *Rol.* 40.

So, if *A.* and *B.* by deed covenant jointly with divers persons, and the seal of one be broken off, the whole deed shall be void. 5 *Co.* 23. *a.*

So, if bound in an obligation jointly and severally, and the seal of one be broken off. *R.* 2 *Lev.* 220.

But where *A.*, *B.*, and *C.* covenant severally with divers persons, who join in a covenant to them, and the seal of *A.* is broken off; the deed shall be void only as to him; for it is *quasi* a several deed as to them. *R.* 5 *Co.* 23. *a.*

So, if the seal be broken off by mice, after *non est factum* pleaded, it shall not be void. 1 *Rol.* 40.

### (G) When a Deed takes Effect.

**A** Deed is not in force, though it be signed and sealed, till delivery.

And therefore, if a condition be that he shall pay for corn *tunc*, or *postea* delivered, it does not bind him to pay for corn delivered after the date, and before the delivery of the deed. *R.* 2 *Cro.* 264.

### Deeds, when Evidence.

*Vide Chancery*, (T 7.)—*Evidence*, (B 1, &c.)

### Oyer of Deeds.

*Vide Pleader*, (P 1.)

### Shewing of Deeds.

*Vide Pleader*, (O 1, &c.)

*Vide also Chancery*, (3 I 1, &c.)—*Franchises*, (F 13.)—*Surrender* (B—C).

### FALSE AFFIRMATION, AND WARRANTY.

*Vide Action upon the Case for a Deceit*, (A 8, 9, 10, 11.—E 4.)

### FALSE IMPRISONMENT.

*Vide Imprisonment*, (L 1, &c.)—*Pleader*, (3 M 22.)

### FALSE JUDGMENT.

*Vide Pleader* (3 D).

### FALSE LATIN.

*Vide Abatement*, (H 2.)—*Amendment*, (D 2.)—*Obligation*, (B 3. 5.)

### FALSE RETURN OF MEMBERS OF PARLIAMENT.

*Vide Parliament*, (D 15.)



## FALSE SUGGESTION.

*Vide Grant, (G 9.)—Patent, (F 2.)*

## FALSIFYING A RECOVERY,

*Vide Recovery, (B 6, &c.)*

## FEALTY.

*Vide Copyhold, (K 9.)—Homage (D).*

## FEE-FARM.

*Vide Rent, (C 3.)*

## FEES.

*Vide Extortion.—Officer (G 15.—H).—Viscount, (F 1, 2.)*

## FEE-SIMPLE.

*Vide Copyhold, (C 7.)—Devise, (N 4.)—Estates, (A 1, &c.)—Officer, (B 7.)*

## FEE-TAIL.

*Vide Copyhold, (C 8, 9.)—Devise, (N 5, 6.)—Estates, (B 1, &c.—C 1, &c.)—Officer, (B 8.)*

## FELO DE SE.

*Vide Justices of Peace, (M 3.)*

## FELONY.

*Vide Action upon the Case, (B 5.)—Action upon the Case for Defamation, (D 3, 4.)—Admiralty, (E 4, &c.)—Forfeiture, (B 3.)—Justices (M 1, &c.—N 2.—O 1, &c.—P 1, &c.—S 1, &c.—Z).—Justices of Peace, (B 3.)—Leet, (L 1.)—Pleader, (2 S 18.)—Testmoigne, (A 3.)—Utlagary, (D 1.)—Waife (C).*

## FEME.

*Vide Officer, (B 2.)*

## Feme-Covert.

*Vide Administration (D).—Bankrupt, (D 7. 11.)—Baron and Feme, per Totum.—Capacity, (D 2.)—Chancery, (2 M 1, &c.—3 Z 1, &c.)—Devise, (H 3.)—Discent, (D 8.)—Dower, per Totum.—Fine, (K 3, 4.)*

## Feme-Sole.

*Vide Baron and Feme, (A 1, &c.)*

## Feme-Sole Merchant,

*Vide Baron and Feme, (A 2.)—London, (N 7.)*

## F E O F F M E N T.

## (A) A Feoffment.

(A 1.) Of what Effect it shall be.

**A** FEOFFMENT is a conveyance of lands and tenements in possession by one to another in fee. *Co. L. 9. a. 2 Rol. 1. a.*

And it is the most entient and most beneficial conveyance.

If the feoffor was out of possession, by the feoffment and livery thereon the estate is brought back, and the feoffee has the freehold perfectly, tho' he could not have had it by fine, recovery, bargain and sale, or other conveyance. *Co. L. 48. b. 49. a.*

Who may make a feoffment, or take thereby, *vide in Capacity.*

[A feoffment passes or extinguishes all collateral rights; thus, it extinguishes a right to a way. *Barnes, 155.*]

*Vide Recovery, (B 2, 3.)*

(A 2.) Of what Things.

A feoffment may be made of all corporeal estates; as, of houses, lands, tenements, &c. *Co. L. 49. a.*

So, a feoffment may be made of lands in which a man has no fixed estate; as, if he has twelve acres to be annually assigned in such a meadow: and livery in any acre, which he has at the time of the feoffment, is sufficient. *Co. L. 4. a. 48. b. 2 Rol. 10. l. 40—50.*

So, if a feoffment be of 50 acres towards the North in such a moor, which contains 100 acres, livery in any of them is sufficient. *2 Rol. 11. l. 5. Dy. 372. b.*

So, if two manors be divided *alternis vicibus* between parceners, either may make a feoffment of her manor; and the deed ought to comprehend both, and she shall make livery in one *secundum formam chartæ* this year, and in the other the next year. *Co. L. 48. b.*

But a feoffment cannot be made of a thing of which livery cannot be given; as, of incorporeal inheritances, rent, advowson, common, &c. *2 Rol. 1. l. 20.*

Tho' it be an advowson, &c. in gross. *Cont. 11 H. 6. 4. Acc. 2 Rol. 1. l. 21.*

So, a feoffment of lands, which are uncertain till a future act, is void; for livery does not operate *in futuro*; as, if A. agrees by indenture to convey 20*l.* *per annum* in land to such an use, and 20*s.* *per annum* to such an use, and makes a feoffment of all his lands to the uses in the indenture, it will be void for all but that where livery was made, it not being ascertained, which shall be to one use, and which to another. *R. 1 Rol. 187.*

(A 3.) By what Words.

No precise words are requisite to a feoffment; and therefore a conveyance by other words, as well as by the word *enfeoff*, amounts to a feoffment. *2 Rol. 73.*

So, *dedi & concessi.* *2 Rol. 73.*

So, if a man by deed *bargains and sells* land to A. and his heirs, and livery be made, it shall be a feoffment. *R. 1 Leo. 25.*

So, if a man says, *all my lands belonging to the monastery of A., I give*  
to

to B., livery being made; his manor belonging to the monastery of A. passes. *Semb. Sav. 104.*

So, if the condition of an obligation, &c. be to make a feoffment to A., and he makes a lease and release, it is sufficient; for it is *tantamount*. *Co. L. 207. a.*

So, if the words are sufficient for a feoffment or other conveyance, the vendee may take by which conveyance he pleases; as, if a lessor by deed *dedit & concessit* to the lessee for years, with a letter of attorney to make livery, and delivers the deed to the lessee, and afterwards livery is made; the lessee may take it as a feoffment, or a confirmation. *R. 2 Leo. 192.*

### (B) Livery of Seisin.

(B 1.) When it shall be good.

(B 1.) Livery **T**O every feoffment, or passing of freehold by a conveyance at common law, livery of seisin is requisite. *Co. L. 48. a. Vide post. (B 3.)*

Livery may be in fact or in law. *Ibid.*

Livery in fact is, when a man delivers the ring of the door, a turf, or twig, to the feoffee upon the land, *in the name of seisin.* *Ibid.*

Or, delivers the deed of feoffment upon the land, *in the name of seisin.* *Ibid.*

Or, delivers any thing which does not relate to the land, upon the land, *in the name of seisin.* *Ibid.*

So, if he being in the house, or at the door, says to the feoffee, *I deliver you seisin, or possession, of this house, in the name of all the lands in this deed, according to the effect of this deed, without other act or ceremony.* *Ibid.*

Or, *enter into this house, or land, and have or enjoy it, according to the deed.*

Or, *enter, &c. and God give you joy.* *Ibid.*

Or, *I am content you enjoy this land according to the deed.* *Ibid.*

*Stand forth, I here give thee this land.* *2 Rol. 7. l. 30. Popb. 47.*

Or, if being sick in the house, he makes a feoffment to A. and says, *I consent you take livery presently,* and orders his servants to take him for their master. *2 Rol. 7. l. 25.*

So, if he says any words to the same import. *Co. L. 48. a.*

If the land lies in several counties, he ought to make livery in each county. *Lit. f. 61.*

But livery in part, in the name of the whole, is sufficient for all in the same county. *Ibid.*

So, if an heir enters into part of the land descended, and makes livery therein in the name of the whole, it is sufficient for all the lands which descended. *2 Rol. 5. l. 36.*

If a man leases to A. for years, remainder to B. in fee, in tail, or for life, he must make livery to A. *Lit. f. 60. Mo. 14.*

And if a lease be to A. and B., livery to one of the lessees is sufficient. *Co. L. 49. b.*

(B 2.) *Secundum formam chartæ.*] If livery be made *secundum formam chartæ*, this implies the effectual quantity and quality of the estate contained in the deed. *Co. L. 48. a.*

And



And therefore, if he delivers feisin of one parcel *secundum formam chartæ*, tho' he does not say *in the name of the whole*, all in the deed passes. *Co. L. 48. a.*

Or, to one feoffee, the estate passes to all the feoffees named in the deed. *Co. L. 48. a.*

So, if he makes livery *secundum formam chartæ*, it operates according to the effect of the deed, tho' there be a mistake of a name, &c. in the deed. *R. 2 Rol. 2. l. 6.*

So, if the party adds words contrary to the intent of the deed, they shall be rejected; as, in the deed conveys in fee, and livery is made for life *secundum formam chartæ*, the fee passes. *Co. L. 48. a.*

(B 3.) *Livery by attorney.*] Livery ought to be made by the feoffor, and taken by the feoffee, in person, or by attorney lawfully constituted. *Vide post.* (B 8)

If an attorney be appointed to make, or take livery, it ought to be by warrant of attorney in writing.

And either party may make one or more to be his attorney, to give or take livery for him. *2 Rol. 8. l. 25.*

A man attainted, outlawed, excommunicated, professed, a villein, an alien, an infant, or *feme-covert*, may be an attorney to make, or take livery. *Co. L. 52. a.*

So, a husband may be attorney for his wife, or a wife for her husband. *Ibid.*

So, he in remainder for the lessee for life. *Ibid.*

Lessee for years for him in reversion, or remainder. *Ibid.*

And, if a lessee for years makes livery for his lessor, his term is not merged. *Co. L. 52. a. R. 1 Leo. 192.*

So, if a reversioner makes livery for the lessee for life, he may enter for the forfeiture. *Co. L. 52. a.*

Otherwise, if a reversioner makes livery for a lessee for years; for his livery cannot be for the lessee, who has no freehold. *Ibid.*

If an attorney makes livery of an acre in the name of all, it is sufficient for the whole, tho' his warrant was to make livery of all. *2 Rol. 8. l. 17. 43.*

So, if he makes livery in one *secundum formam chartæ*, which comprehends the whole. *Co. L. 52. a.*

Or, makes livery to one *secundum formam chartæ*, when the feoffment was to several persons. *Ibid.*

Tho' his warrant was express to enter into all, and to make livery of or to all. *Ibid.*

If a warrant be to three *conjunctim & divisim* to make livery in all and singular the lands, &c. each severally may make livery of part of the lands. *R. 1 Leo. 192. 1 And. 246. 4 Leo. 196.*

If the warrant be, that he shall enter into any part in the name of the whole, he may make livery of lands in the possession of several tenants, severally. *R. Hard. 314.*

So, if livery be made after three rent-days incurred, it shall be good, if it is not confined to any time. *R. Mo. 875.*

But he ought strictly to pursue the effect of his warrant; and therefore, if the feoffor was disseised, and gives a warrant to enter into all the parcels, and make livery of them; if he enters only into one, and makes livery *secundum formam chartæ*, it shall be void; for, without entry

entry into all, the estate shall not be reverted for so much into which he did not enter. *Co. L. 52. a. 2 Rol. 9. l. 15.*

So, if a letter of attorney recites a feoffment of 10th April, where it was 9th April, and gives authority to make, or take livery *secundum formam & effectum chartæ prædictæ*, and livery be made upon it, it will be void; for there is no such feoffment. *R. Cro. El. 603.*

So, an attorney cannot make livery within view. *Co. L. 52. b.*

If a feoffment be by indenture, there cannot be a warrant of attorney therein to make livery, if the attorney be not made a party to the indenture. *Ibid. (Vide margin ibid. cont.)*

But a deed-poll may contain also a warrant of attorney to make livery. *Ibid.*

How livery shall be made in a feoffment of a moveable inheritance, *vide ante, (A 2.)*

(B 4.) *Livery in law.*] So, if the feoffor says to the feoffee, in sight of the house or land, *I give you yonder house, &c. enter and take possession*, and he enters in the lifetime of the feoffor, it shall be a good livery in law. *Co. L. 48. b. R. Pol. 47.*

Or, *enter and enjoy it according to the effect of this deed.* *2 Rol. 7. l. 1.*

Or, if he delivers to him the deed, and says, *God give you joy of it.* *2 Rol. 7. l. 5.*

Or, *I will you enjoy according to this deed*, and shews him the land. *2 Rol. 7. l. 10.*

So, livery within view shall be good, tho' the feoffment be without deed. *Co. L. 48. b.*

Tho' the land lies in another county. *Ibid.*

So, it shall be good if the feoffee enters in the life of the feoffor, tho' the feoffee be a woman, and married before her entry, to the feoffor, or any other, who enters and claims in the right of his wife. *2 Rol. 3. K. 1 Mod. 91.*

Tho' the feoffor be a woman; and married to the feoffee before entry. *R. 1 Vent. 186. Pol. 50. 2 Lev. 34.*

So, if the feoffee dares not enter for fear of death or mayhem, it is sufficient if he comes as near the land as he dares, and claims it. *Co. L. 48. b.*

*Vide post. (B 8.)*

(B 5.) When Livery is not good.

But if a man delivers a deed of feoffment to the feoffee upon the land without saying, *in the name of seisin*, it is not a good livery; for it has another effect. *Co. L. 48. a.*

So, if a man says to another upon the land, *I give or demise you this land for life*, without more, it does not amount to a livery. *Ibid.*

Or, if he shews him the land, without saying any thing, and he enters and the feoffor agrees thereto. *2 Rol. 7. l. 15.*

So, if a feoffment be to A. for years, remainder to B. in fee, livery cannot be given to A. within view; for no one can take by livery in law, who does not take the freehold. *Co. L. 49. b.*

So, if an actual livery was intended, and is not well executed, it shall not be good as a livery in law. *2 Rol. 7. l. 40.*

(B 6.) *If the deed to which it relates is void.*] So, if a man makes livery

*livery secundum formam chartæ*, it has no operation, if the deed be of no effect; as, if the deed be, *habendum* after the death of the feoffor, or *in futuro*. *Co. L. 48. b. Vide post. (B 8.)*

So, if a man leases for years by deed, and makes livery to the lessee *secundum formam chartæ*, the lessee has only for years, and the livery is void. *Co. L. 48. b.*

(B 7.) *If it be not made of the possession.*] So, if *A.* makes a lease for years, and afterwards makes a feoffment of the same land, and livery, without the *ouster* or assent of the lessee, it shall be void. *Co. L. 48. b. 2 Rol. 4. l. 1. 16. Mo. 11.*

So, if a lease be of a house and several closes, and livery is made in the closes, when the lessee, his wife, or servants continue in possession in the house, it shall be void for the whole; for possession of the house, or any part of the land by the lessee, is possession of the whole. *R. 2 Co. 32. a. 2 Rol. 4. l. 40. 50. Mo. 250. Co. L. 48. b.*

So, if lessee for years leases part to *B.* at will, and livery be in the part of *B.* with his assent, without the assent or *ouster* of the lessee for years, it shall be void for the whole. *2 Rol. 4. l. ult.*

So, if the lessee be absent, but his servant continues in possession, and livery is made with the assent of the servant; for his assent does not dispossess his master. *2 Rol. 5. l. 7.*

So, if a stranger makes a feoffment of land, and livery with the assent of lessee for life, without ousting him; it shall be void. *Jon. 457.*

So, if tenant by statute-merchant, staple, or extent, be in possession, livery of the land without his assent shall be void. *2 Rol. 3. l. 53.*

So, if the lessor enters upon the king lessee for years, and makes livery, it shall be void; for his entry does not oust the king. *2 Rol. 5. l. 18.*

But if livery be made by the lessor, when his lessee, his wife and servants, are all absent; tho' he has cattle upon the land, it shall be good. *Co. L. 48. b. 2 Rol. 4. l. 21. 45. Dy. 340.*

Or, if the lessee be present and assenting. *2 Rol. 5. l. 15.*

Or, if he be only lessee at will, tho' he dissents; for the livery shall be a determination of the will. *Dy. 18. b. 2 Rol. 4. l. 14.*

So, if the lessor ousts his lessee and family, and makes livery; it shall be good, tho' the lessee dissents.

Or, if the lessee and his family quit the possession at the time of the livery. *R. Dy. 363. a. 2 Rol. 5. l. 5.*

So, if the king lessee for years leases to *B.*, and the reversioner ousts *B.* and makes livery. *2 Rol. 5. l. 20.*

So, if husband and wife are joint-tenants, and the husband makes a feoffment; the livery shall be good, tho' the wife be upon the land, and dissent. *2 Rol. 5. l. 30.*

So, if a man makes a feoffment of land, part in possession and part in lease, and makes livery upon the land in possession (without *ouster* of the lessee, or his assent) in the name of the whole; it shall be good for all that is in possession. *Dy. 18. b. 2 Rol. 4. l. 5. 10.*

So, if the other part was in possession of a disseisor. *2 Rol. 6. l. 12.*

So, if the feoffor has part in his own right, and part as guardian, livery



livery in his part, in the name of the whole, shall be good for the whole. *R. 2 Rol. 4. l. 32.*

So, if tenant in tail makes a discontinuance to the use of himself in fee, and afterwards leases for years, and dies; a feoffment by the issue and livery shall be good, without *ouster* or assent of the lessee; for before entry the issue was remitted, by which the lessee became tenant by sufferance. *R. 2 Rol. 5. l. 45.*

So, the king's tenant may make a feoffment and livery, before livery sued, or an *amoveas manum* executed. *2 Rol. 5. l. 25. 50. Cro. El. 523.*

(B 8.) *If it does not take effect immediately.*] So, livery is not good, where it does not take effect immediately; for it cannot give a freehold *in futuro*. *Co. L. 217. a.*

As, if a lease be to commence at *Michaelmas*, remainder to *A.* in fee, and livery is made before *Michaelmas*; it shall be void. *Co. L. 217. a. 2 Rol. 109.*

So, if a lease for years begins immediately, remainder to the right heirs of *A.*, the remainder shall be void; for there is no one in whom the freehold can vest; for *non est heres viventis*, and a freehold shall not commence, or expect *in futuro*. *Co. L. 217. a.*

So, if *A.* leases for life, and afterwards grants the reversion, *habendum* after the death of the lessee for life; it will be void, being made to commence *in futuro*. *R. 1 Rol. 261. Vide infra.*

So, if a lease be 10th *June* to *A.* for life, *habendum a die datûs*, and livery by attorney 23d *July*; it shall be void. *R. per three J. 2 Cro. 153. 1 Rol. 229. R. Cro. Car. 388. 1 Rol. 828. l. 10.*

So, if livery be made the same day by the lessor in person. *R. 1 Rol. 828. l. 20. 829. l. 10.*

So, if *A.* leases for years to *B.*, and afterwards confirms his lease, and grants to *B.* for one month after his former term, remainder to *A.* in fee; it will be a void grant of the fee; for he does not grant it as a reversion. *R. 1 Rol. 828. l. 30.*

If *A.* enfeoffs *B.* of 10 acres out of 100 which *B.* or his heirs shall chuse, it shall be void; for the livery cannot operate *in futuro* at his election. *1 Rol. 829. l. 20.*

So, if the king by patent leases lands to *A.*, *habendum a die datûs*; it shall be void; for a freehold cannot wait, tho' it be by the king's letters patent. *R. 5 Co. 94. b.*

But by grant a freehold may be created to commence *in futuro*; as, the king may grant an office for life to *B.*, to commence after the death, &c. of *A.* who has it at will. *R. Sal. 466. Skin. 446. 580.*

So, a rent *de novo* may be granted to commence upon a contingency. *Sal. 466.*

So, a grant of a rent, *habendum* after his death, if he has not issue then living. *R. 3 Lev. 370.*

So, a man, by covenant to stand seised to the use of another, may make an estate to commence *in futuro*. *2 Cro. 180. 3 Lev. 371. Vide Covenant, (G 1.)*

So, a surrender of a copyhold, *habendum* after his death, is good; for the estate vests in the lord. *R. Noy, 152.*

So, if a lease be to *A.* for life, *habendum a die datûs*, and the deed be not delivered till the day after the date, and then livery is made by

by attorney; it shall be good. 2 Cro. 153. 1 Rol. 829. l. 5. 1 Rol. 230.

If a lease be to A. for three lives 8th August, *habendum a die consecutionis*, and livery is made by the lessor himself 9th September after; it shall be good. R. 2 Cro. 458. 2 Rol. 109. R. Mo. 759. R. Cro. Car. 95.

So, if a lease be by husband and wife, to A. for life, *habendum* after Michaelmas next, and livery is made by them after Michaelmas; it shall be good. R. 2 Cro. 563.

So, if livery be by attorney, where the letter of attorney is express to make livery after Michaelmas. *Ibid.*

So, if it be found by verdict, *quod A. dimisit*; tho' the lease appears to be *a die datus*, it shall be good; for it shall be intended that livery was made after the day. Cro. Car. 96.

But if the jury do not find a demise, or when livery was made, it cannot be intended after, any more than before. *Per three J.* 1 Rol. 230.

So, if a feoffment be by an infant to commence at a future day, before which the feoffor comes of full age, and after the day he makes livery; it shall be good. 2 Rol. 109.

F E R Æ N A T U R Æ.

*Vide Biens (F).*

F E R R Y.

*Vide Pischary (B).*

F I E R I F A C I A S.

*Vide Execution, (C 4, &c.)—Process, (F 5. 7.)*

F I N E.

(A) The Antiquity of it.

A FINE is a feoffment upon record. Co. L. 10. a.

But it is an improper feoffment. 1 Sal. 340.

And it is called a fine, because *finem ponit litibus*. Co. L. 262. Pl. Com. 369.

And it is as antient as any court of record. Pl. Com. 357. a. 368. b.

And it was levied before the Conquest. 2 Inst. 511. Pl. Com. 368. Dub. Mad. Form. Inst. 13.

(B) By whom it may be levied.

ALL persons of full age and sound memory may levy fines of lands of which they are seised. *Vide West. Symb. 3. a.*

Tho' seised only of a reversion or remainder. *Vide West. Symb. 3. b.*

So, husband and wife, of lands of the wife.

So, a parcener, joint-tenant, or tenant in common, may levy a fine of his purparty. *Vide West. Symb. 3. b.*

So,

So, a corporation sole may levy a fine of his lands, which he has in his corporate capacity.

So, a man may levy a fine, tho' he be outlawed in a personal action.

[So, tenant in tail who has committed murder, before conviction; and it shall bar the heir in tail. *Stevens v. Winning*, H. 4 G. 3. 2 *Wilf.* 219.]

[So, infant trustees, by order of Chancery. *Barnes*, 217.]

So, a fine by a man *non compos*, tho' it ought not to be levied, binds for ever, when it is levied.

[If it is suggested that cognisor is insane, he may be produced and examined in court. *Barnes*, 218.]

So, a fine by a man attainted for treason or felony, binds all but the king. *Vide West. Symb.* 3. a.

[So, a fine levied, by a tenant in tail who had committed murder, between the time of the stroke and the conviction, shall bar the tail. *Semb.* 2 *Wilf.* 220.]

So, a fine by an alien.

So, a fine by an infant, or *feme-covert* without her husband, binds till it be avoided. *Vide Baron and Feme*, (P 1.) — *Enfant*, (B 2.)

[*Vid.* 2 *Bl. Rep.* 1205. a fine acknowledged *de bene esse*, by a *feme-covert* whose husband was abroad, before the Lord Chief Justice then in court.]

But, a fine cannot be levied by a corporation aggregate; for it cannot act but by attorney, and it cannot make consance by attorney.

So, if commissioners take a fine of an infant, &c. the court will grant an attachment against them; and, upon examination and inspection, the fine shall be vacated. *R. Skin.* 24.

### (C) To whom.

**A**LL persons who may be grantees, may be conusees of a fine. *Vide West. Symb.* 4. a.

So, a fine may be levied to a corporation aggregate. *Ibid.*

But a fine cannot be levied to any not a party to the writ of covenant, except by way of remainder.

Nor, to two persons and their heirs; for the court will refuse it. *R. 1 Leo.* 62.

Yet the king may levy a fine to two and their heirs, and the court will not refuse it.

So, the king's tenant for the king's benefit.

### (D) Before whom.

**B**Y the *st.* 18 *Ed.* 1. *de modo levandi fines*, a fine ought to be levied before four justices in *C. B.* or in *eyre*, and not elsewhere.

And the number of justices ought to be above one; and therefore, they were named antiently, that the number might appear. 2 *Inst.* 514. 1 *H.* 7. 10, 11.

Now, by *st.* 4 *H.* 7. fines may be levied before the justices of the common pleas.

And therefore, the number of the justices is not now material. 2 *Inst.* 515.



If it be before three justices in C. B. omitting the other, it shall be good. *Semb. Cro. El. 677.*

So, a fine may levied in the counties palatine of *Lancaster* and *Chester*. *Vide West Symb. 5. b.*

[And if a fine be found by a verdict to have been levied before the justices of the county palatine of *Lancaster*, the court will presume they were justices who had power to take the fine. *1 Wilf. 275.*]

So, before justices in *eyre*. *2 Inst. 515.*

And in a court of *antient demesne*, of lands of *antient demesne*. *R. 1 Sal. 340. Vide Antient Demesne, (G 2.)*

But a fine cannot be levied in *B. R.* *2 Inst. 515.*

So, by the *st. de modo levandi fines*, 18 *Ed. 1.* it ought to be before the justices of C. B. or in *eyre*, and not *elsewhere*: and therefore, where a man has power *tenere placita*, a fine cannot be levied before him. *2 Inst. 515.*

So, against those negative words of the statute, the king cannot grant a power to levy a fine. *2 Inst. 515.*

So, a man, or a corporation, cannot prescribe for levying fines in his court. *Dub. 1 Leo. 188. Cro. El. 116. Ow. 93. 1 Sal. 340.*

So, a fine cannot now be levied in the *Exchequer*, tho' it was antiently levied there. *Mad. 145.*

## (E) The Parts of a Fine.

### (E 1.) The Original Writ.

(E 1.) Upon what writ **T**HERE are five parts of a fine. *5 Co. 38. b.*

*it may be levied.] 38. b.*

The first part of every fine is the original writ. *5 Co. 38. b.*

By the *st. 18 Ed. 1.* the order of law does not suffer that a final accord be levied in the king's court without an original writ. *D. cont. 21 Ed. 4. 60. b. 62. a. 4. b. Mad. Form. Int. 17.*

The most usual writ, upon which a fine is levied, is a writ of covenant, which is not personal, but real, and requires performance and execution of the covenant. *1 Sal. 340.*

Yet it may be levied upon every writ, by which land is demanded, or by which land is charged or bound, or which concerns land in any fort. *5 Co. 38. b. 1 Sal. 340.*

As, in a writ of right. *1 Sal. 340.*

A *warrantia charta*. *3 Co. 39. Bend. pl. 138. Mad. Form. 368. 370.*

A writ of *mesne*. *5 Co. 39.*

A writ of customs and services. *Vide West Symb. 6. a. 2 Inst. 513.*

A *præcipe quod reddat*. *5 Co. 39.*

*Per quæ servitia, or quem redditum reddit.* *5 Co. 39.*

*De rationabilibus divisis.* *5 Co. 39.*

In an assise of *mortd'ancestor*. *Mad. Form. 365, 366.*

In a writ *quod habeat a way ultra terram* of the conusor. *Vide West Symb. 6. b. 2 Inst. 513.*

So, in a writ of *darrein presentment, quare impedit, &c.* *2 Inst. 514. Mad. Form. 364.*

So, a fine may be levied by a vouchee to a demandant, or by the demandant to him. *2 Inst. 514.*

Or, by tenant by receipt to a demandant, or by the demandant to him. 2 *Inst.* 514.

But a fine without an original writ is erroneous. 2 *Inst.* 513.

So, if it contains more than was in the original. 2 *Inst.* 513.

Or, be levied to more persons. 2 *Inst.* 514.

The writ of covenant, upon which a fine is levied, ought to be written without rasure, or interlineation.

It ought to be without false *Latin*.

The *teste* ought not to be upon a day not *dies juridicus*.

It ought to have fifteen days between the *teste* and return.

It ought, regularly, to be teste'd before the *dedimus potestatem*.

Or, upon the same day. *Hut.* 135. *Vide post.* (E 7.)

It ought to be returned as another writ.

If a fine be of a thing not comprised in the original, it is void for that; as, if the writ be of the manor of B., and the fine of the manors of B. and C., it is voidable for the manor of C. 2 *Inst.* 513.

(E 2.) *Of what things.*] A fine may be levied of all things, of which a *præcipe quod reddat* lies. 2 *Inst.* 513.

As, of all manors, messuages, lands, tenements, and hereditaments. *West Symb.* 6. b.

Of a rent *in esse*. *Vide West Symb.* 6. b.

So, of a rent not *in esse* before. *Vide West Symb.* 6. b.

Of a reversion, or remainder, *Vide West Symb.* 7.

So now, since the *st.* 32 *H.* 8. 7. it may be levied of rectories, vicarages, tithes, pensions, oblations, and all ecclesiastical inheritances made temporal.

Of a chantry. *Vide West Symb.* 7.

So, it may be of a feigniory. *Vide West Symb.*

Of all services; as, homage, fealty, &c. *Vide West Symb.* 6. b.

Of acquittal, and of every thing for which a *præcipe quod faciat* lies. 2 *Inst.* 513.

So, it may be levied of common of pasture. *Vide West Symb.* 6. b.

Of a corody. *Vide West Symb.* 6. b.

Of an office; as, of the custody of a forest.

Of a boilary.

Of two pools and a fishery in the water of D.

Of an annuity.

(E 3.) *In what order.*] All things, of which a fine is levied, ought to be mentioned in proper order. *Vide West Symb.* 8. b.

As, an honour before a castle, a castle before a manor, a manor before a messuage, *Vide West Symb.* 8. b.

A messuage, toft, mill, dovecote, garden, land, meadow, pasture, wood, heath, moor, juncary, marsh, alder, broom, rent, follow according to the verses in the register. *Mes. toft. mol. col. gard. ter. prat. past. bos. brue. mora. junca. maris. alnet. rusc. redd. seclare priora* *Vide West Symb.* 9. b.

Things general ought to be put before special; as, land, the *genus* before meadow, pasture, wood, &c. which are *species* of it. *Vide West Symb.* 8. b.

So, things entire before parts of a thing. *Vide West Symb.* 8. b.

So, things excepted, after the thing out of which they are excepted. *Vide West Symb.* 8. b. 1f

If there are several distinct things, each, after the first, begins with these words, *ac de, necnon, ac etiam, præterea, ac ulterius, ac insuper*; and so *seriatim toties quoties*. 2 *Inst.* 514.

And for want of the regular order of these words in a fine, the forgery of it has been detected. 2 *Inst.* 514.

(E 4.) *By what names.*] In a fine, an honour may be named by the name of *the honour of T.* *Vide Grant, (E 4.) Vide West Symb. 7. b. Vide Grant, (E 1, &c.)*

Or, may pass by the name of a manor. *Vide West Symb. 7. b.*

So, a castle, hundred, &c. may be demanded by their own names. *Vide West Symb. 7. b.*

Or, may pass by the name of a manor. *Vide West Symb. 7. b.*

So, a manor may be demanded by the name of *the manor of B.*, without naming any vill in which it lies. *Vide West Symb. 7. b.*

And by the name of a manor, a manor only in reputation passes. *Cont. Noy, 7. R. cont. Cro. El. 524. 707. Vide 1 Lev. 27. R. acc.*

So, lands reputed parcel for 80 years. *R. 1 Lev. 27. Vide Grant, (E 10.)*

So, by the name of a messuage, a curtilage, garden, orchard, shop, mill, dovehouse pass. *Vide West Symb. 7. b.*

So, a toft, cottage, chamber, cellar, &c. *Vide West Symb. 7. b.*

Or, they may pass by their respective names. *Vide West Symb. 7. b.*

So, a chapel, or hospital. *Vide West Symb. 7. b.*

So, it may be levied of any thing, of which a *præcipe quod reddat* lies. 2 *Inst.* 513.

Or, of which a *præcipe quod faciat, permittat, or teneat* lies. 2 *Inst.* 513.

Land ought to be demanded by the number of acres in such a vill. *Vide West Symb. 8.*

If the intent appears, that all the estate in *B.* shall be included, all passes by so many acres as is the reputed measure; tho' by the *st. de terris mensurandis* the measure is not above three fifths of the estate. *Semb. 2 Mod. Ca. 276. (2d part of 2 Mod. Ca.)*

So, of two parts of a manor, is sufficient; without saying, in three parts to be divided. 1 *Leo. 115.*

But a fine of a tenement is not good; for it is not of a certain import. 1 *Leo. 188.*

The usual manner is to name the lands in such a parish, vill, or known place. 2 *Mod. 48.*

So, it may be in a hamlet. 2 *Mod. 48.*

Or, of a tenement in *Golden Lane*, tho' it be not a vill, or a hamlet. 2 *Mod. 47. R. Cro. El. 693.*

Or, in the liberty of *W.* *R. 2 Mod. 49.*

So, if there are the vills of *W.* and *C.* within the liberty of *W.*, a fine of lands in the liberty of *W.* passes the lands in all the vills in that liberty. *R. 2 Mod. 49.*

So, a fine of lands in a parish passes lands in all the vills in the same parish. *R. 1 Vent. 170. 2 Cro. 120.*

So, if a fine be of a house, or land, by a known name, tho' there be not any such vill or place; as, if the house be called *Easton* in *B.*, and a fine be of lands in *A.*, *Easton* and *C.*, omitting *B.*, it shall be good. *R. Cro. Car. 269. 276. Godb. 440. Jon. 301.*



If a close be named *A.*, and a fine be of land in *A.*, where there is no such vill. *R. 2 Cro. 574.*

So, if a fine be of pasture in *Arshcom*, where it is written *Arfcomb*. *2 Cro. 574.*

If a fine be of lands in *O.*, to the use of *B.*, of lands in *S.*, which is a place known in the vill of *O.*, to the use of *C.*, it shall be good to *C.*, for the lands in *S.* *R. 1 And. 245.*

But, if a fine be levied of lands in *A.*, this passes only land in the vill of *A.*, and not land in *B.* or any other vill within the parish of *A.* *R. 2 Cro. 120. Vide Parisb, (C 1, 2.)*

Or, in *B.*, it does not pass land in a hamlet of the same parish, which has separate constables; for it is a distinct vill. *R. 1 Vent. 143. 1 Vent. 170.*

(E 5.) *The caption of the fine in court.*] By the common law, the parties who levied a fine ought to do it in court in person, by which the court might judge of their sufficiency. *2 Inst. 512. Vide Mad. Form. Inst. 14.*

And therefore, after the writ of covenant compounded, indorsed, and entred at the alienation-office, and affixed to the *præcipe* and concord, it shall be delivered to the serjeant. *Comp. Att. 95.*

By the *st. 18 Ed. 1. de modo levandi fines*, when the writ is read in presence of the parties, the serjeant shall say, *conge d'accorder*, the justice says, *que donera*; the serjeant names the parties; and when it is agreed of the sum, the justice says *criez la peace*, and then the serjeant recites the concord. *Vide 2 Inst. 512.*

If there be a *feme-covert* she shall be examined by the puisne judge, and her examination recorded. *Vide 2 Inst. 515.*

And always, where a *feme-covert* levies a fine, she ought to be examined; and if she does not assent, the fine ought to be received. *2 Inst. 515.*

So, if a fine be levied of land to husband and wife, who grant and render it; there the wife ought to be examined. *2 Inst. 515.*

But, where a fine is levied of land to husband and wife, she need not be examined. *2 Inst. 515.*

And, if her examination be recorded, it cannot afterwards be averred that she was not examined. *2 Inst. 515.*

So, a fine taken in court need not be signed by the hand of the judge, as is done where it is taken out of court. *Semb. Dy. 320. b.*

(E 6.) *Out of court. Before the chief justice.*] The chief justice of *C. B. virtute officii* may take the caption of a fine out of court, without a *dedimus potestatem*. *2 Inst. 512. Dy. 224. b. Cro. El. 469.*

The *præcipe* and concord in paper shall be read to the parties in the presence of the chief justice, and being acknowledged and subscribed by them, the chief justice sets his name to it. *Compl. Att. 96.*

Afterwards it shall be engrossed in parchment, and signed by the *Ch. J.*, and upon that the curfitor makes the writ of covenant, which shall be compounded at the alienation-office, and the king's silver paid, and the fine conveyed to the other offices. *Compl. Att. 96.*

So, a judge of assize may take a fine, without a *dedimus potestatem*, if he has a special patent to take them in his circuit. *Dy. 224. b.*

But,

But, the chief justice of *B. R.*, or any other judge, cannot take the caption of a fine, without a *dedimus potestatem*. *Dy. 224. b.*

(E 7.) *By dedimus protestatem.*] By the *st. Carl. 15 Ed. 2.* if any by age, impotence, or casualty, be withholden that he cannot come to our court, two or one of the justices, by assent of the rest, shall go to the party diseased, and receive his consufance on the plea in which the fine ought to be levied, &c.

If there go but one, he shall take with him an abbot, prior, knight, or man of good fame or credit, and certify the court thereof by the record; that all things incident to the fine being examined by him, it may be duly levied.

And upon this a *dedimus potestatem* is granted to any judge, serjeant, or knight only, to take the fine; for it is now usual for one only to do it, tho' the statute says, *if one go, he shall take with him an abbot, &c.*

So, it may be granted to other commissioners, if a knight be named in the writ of *dedimus potestatem*.

After the writ of covenant, and *dedimus potestatem* sealed, compounded, and affixed to the *præcipe* and concord, the judge, &c. or commissioners shall take the caption of the fine.

The *dedimus potestatem* shall be good, tho' it bears *teste* before the writ of covenant, and tho' it recites the writ of covenant to be depending. *1 Rol. 223. Cro. El. 677. Vide infra.*

Or, after the caption. *R. Cro. El. 275.*

So, the caption may be taken of one, at one time or place, and of another elsewhere. *Cro. El. 577.*

If the *dedimus potestatem* be to take of four, and it be taken of three, and the other refuses, it shall be made good for those three. *R. Cro. El. 576.*

But, if the *dedimus potestatem* be to two jointly, a caption by one will be erroneous. *Cro. El. 240.*

If the return be, *executio istius brevis patet in quodam pannello annex.,* for *in quadâm schedulâ*, it is not material. *R. 2 Cro. 78.*

If the caption be by a *dedimus potestatem*, which bears *teste* upon the same day with the writ of covenant; yet it shall be good, tho' the writ recites the writ of covenant to be depending. *Hut. 135. R. 2 Cro. 11. Vide ante, (E 1.)*

So, if the *dedimus potestatem* bears *teste* before the writ of covenant. *Semb. 1 Rol. 223. R. cont. Cro. 740. Vide supra.*

Tho' it be five years before. *Jon. 420.*

So, if the caption be before the writ of covenant, the fine shall be good; for the fine, being afterwards engrossed, cannot be avoided. *R. 2 Vent. 48. R. Cro. El. 275.*

Or, after the return of the writ of covenant, tho' the writ is not then depending. *R. Hut. 135. R. 2 Jon. 83.*

So, if there be a caption, and the king's silver paid, the fine shall be good, tho' the consufor dies before the fine be engrossed. *2 Inst. 511. 5 Co. 39. a.*

[If the consufor is alive at the payment of the prefine, the fine is good, tho' he dies after the *teste*, and before the return of the writ of covenant. *Barnes, 214, 215. Q. tamen, et vide (E 8.)*]

So, if the consufor dies after the caption, and before the king's silver paid, if the fine be afterwards ingrossed as a fine of a term before his

death; for it cannot be averred against the record. *R. Hob. 330. R. 3 Mod. 141. R. 2 Vent. 48.*

So, if the conusor dies before the time of certifying the caption; for it cannot be averred against the certificate, which is a record. *2 Cro. 12. Dy. 89. b.*

But, if it appears upon record that the conusor died before the writ of covenant returned, it will be error; for by his death the writ abates. *R. Cro. El. 469. R. 2 Jon. 181. Ray. 462. R. Skin. 343.*

[If the conusor die before the return of the writ of covenant, it shall be vacated by the court, without error, tho' it has passed all the offices; for the post-fine, (which is the king's silver,) became due, and was paid after the death of the conusor. *Watts v. Berkett, H. 33 G. 2. 2 Wilf. 115.*]

So, if one conusor dies, it will be error, and the whole fine avoided. *R. 3 Mod. 99. Semb. 2 Lev. 127.*

So, if it appears upon record that the conusor died before king's silver was paid. *Semb. 2 Lev. 127. 2 Inst. 511.*

By the *st. 23 El. 3. sect. 5.* they who certify the caption of a fine, &c. shall mention the day and year of the acknowledgment; and no clerk shall receive it otherwise, on pain of 5 *l.* for every offence.

If a judge, or commissioners, refuse to certify, a *certiorari* lies to them, commanding them to certify.

And if they do not, an *alias*, *pluries*, and attachment lies against them.

But by the *st. 23 El. 3. sect. 5.* they are not bound to certify but within a year after the caption.

If a judge or commissioner dies before certificate, a *certiorari* goes to their executors.

If a caption be by *R. M. knight*, it cannot be alleged that he was not a knight. *R. 2 Cro. 11.*

If a caption recites *præcipe J. Foster*, where the writ and *dedimus potestatem* are *inter J. Foster*, it is not material; for they are the same name in sound. *R. 2 Cro. 77.*

[The due acknowledgment must be sworn to before a justice of *C. B.*, or it cannot pass, oath before *C. J.* in *America*, and attested by a notary, not sufficient. So held, *P. 8 G. 2. Barnes, 216.*]

[Yet it is said it may pass, tho' not signed by the cognizor, on affidavit of commissioner to the due acknowledgment. *Barnes, 219.*]

[So, that it may pass on the affidavit of a commissioner, tho' not an attorney. *Barnes, 217.*]

[And a fine taken at *Hamburgh*, passed on oath before a clerk of the *Hamburgh* Chancery, and authenticated by his certificate as a notary. *M. 24 G. 2. Barnes, 217.*]

[So, a fine taken in *Scotland*, regular in every other respect except that it was not taken in the presence of an attorney of any of the courts of *Westminster-Hall*, who might have made the usual affidavit of its being duly taken, was allowed on the affidavit of the demandant that there was no such attorney resident in or near the place. *East. 13 G. 3. 2 Bl. Rep. 880. Vide Rule, C. P. M. 39 Geo. 3. 1 Bos. & Pull. 362.*]

(E 8.) Licence to agree.

The 2d part of a fine is the licence to agree. *5 Co. 39.*

For



For upon every fine there ought to be paid a sum *pro licentiâ concordandi*. *Vide 2 Inst. 511.*

And this is an autient revenue of the crown. *5 Co. 39. a. 2 Inst. 511.*

This fine is the same as upon every original in a real action; viz. one noble for every five marks *per ann.* *2 Inst. 511.*

And the post-fine is as much as the first fine, and half as much more. *2 Inst. 511.*

If the land be under five marks, there shall be no fine in the hana per, but only one noble *pro licentiâ concordandi*. *2 Inst. 511.*

If no value of land appears indorsed upon the writ of covenant, or otherwise, by which the king's silver may be taxed, it is error. *R. 2 Jon. 83.*

But it is sufficient, if the king's silver be indorsed upon the writ of covenant, under the hand of the judge, tho' it be not entred upon the roll. *Semb. Dy. 320. b.*

[After return of writ of covenant in the life of cognizor, and entry of post-fine at king's silver-office, though after death of cognizor, *caveat* is too late. *Barnes, 218.*]

[If fine is taken, and cognizor dies, and then writ of covenant is sued out, teste'd before the *ded. pot.* but returnable after cognizor's death, and fine passes the offices, and king's silver recorded before *caveat*, yet it is void. The concord is to be made at return of writ of covenant; if party dies before, there can be no agreement. *Barnes, 220.*]

#### (E 9.) The Concord.

(E 9.) *Fine sur consufance de droit come ceo, &c.*] The 3d part of a fine is the concord. *5 Co. 39. a.*

And this contains the substance of the fine. *5 Co. 39. a.*

All fines agreed to be levied are executed, or executory. *Vide West Symb. 5. b. 2 Inst. 513.*

A fine executed is, *sur consufance de droit come ceo, &c.* upon a release, or upon a surrender. *Vide West Symb. 6. 2 Inst. 513.*

A fine *sur consufance de droit come ceo que il ad de son done* is so called from those words in the fine, and it is the most high and powerful fine.

Antiently it had only these words, *recogn. manerium, &c. esse jus ipsius A. ut illa quæ iidem A. & B. habent de dono prædict. D.* *2 Inst. 513.*

Afterwards these clauses were added, *et remiserunt & quietè clam., &c.* and the clause of warranty. *2 Inst. 513.*

A fine *sur consufance de droit come ceo, &c.* grants the fee to the co-nufee; and therefore there cannot be a remainder over upon such fine. *Pl. Com. 248. a.*

But it grants the fee only by implication, which may be controlled by an exprefs limitation for life. *R. 1 Sal. 340.*

If the *præcipe* entred in the concord be *duobus messuagiis*, where the writ of covenant is *duobus toftis*, it is not material; for the concord relates to the writ of covenant and the *dedimus potestatem*, and entry of the *præcipe* upon the concord, is more than is necessary, and ought to be a rehearsal of the substance of the writ; but if it be variant, it is idle. *R. 2 Cro. 78.*

If a *dedimus potestatem* and concord upon it be five years before the writ of covenant, where by the foot of the fine it is said, *hec est finalis concordia capta 7 fac.*, it shall be good; for it shall be intended another concord according to the foot of the fine. *R. by two J. two cont. Jon. 420.*

(E 10.) *Fine upon a release.*] A fine upon a release is, when he in reversion releases by fine his estate to his lessee for life, or years.

If a joint-tenant releases by fine to his companion. *2 Cro. 696.*

If a donor of 50 acres has other 50 acres in *K.*, and levies a fine of 100 acres to the donee, who renders 100 acres to the donor for life, &c. this operates as a release as to the 50 acres contained in the gift, and the render operates as to the other 50 acres only; for it shall be restrained to the quantity intended by the deed declaring the uses, *Poph. 104.*

But a fine does not operate by way of release, where the conusee has no estate of freehold, either in remainder or reversion, or there is no privity between the conusor and conusee. *Ray. 146. Vide Release, (B 3.)*

(E 11.) *Fine upon a surrender.*] A fine upon a surrender is, when a lessee for life, or *pur auter vie*, tenant in tail after possibility, tenant by the curtesy, or in dower, by fine surrender their estates to him in reversion.

A fine upon a surrender is in the form of a fine *sur conusance de droit come ceo*, &c. saving that they add the words, *sursum reddidit*, and omit the warranty.

(E 12.) *Sur conusance de droit tantum.*] Fines executory are a fine *sur conusance de droit tantum*, or, *sur grant & render*. *Vide West Symb. 6.*

A fine *sur conusance de droit tantum* omits the clause *come ceo que il ad de son done*.

(E 13.) *Sur grant & render.*] A fine *sur grant & render* is when by the same fine the conusee renders the estate granted, or part of it, or a rent out of it, to the conusors, or some of them.

And this fine shall be always levied upon a fine *sur conusance de droit come ceo*, &c.; for, if it should be levied upon a fine executory, the conusee has nothing which he can render to the conusor, till execution. *Vide West Symb. 6.*

Or, it may be upon fines upon a release, or surrender; for those are executed.

The render ought to be of a thing issuing out of the same land contained in the fine, and not of a thing collateral, or of another nature, which is not issuing out of it, nor incident to it. *2 Inst. 514.*

It ought to be to some party to the fine, if it be not by way of remainder. *2 Inst. 514. 4 Leo. 26.*

So, a render shall be only of the lands granted by the fine, and intended to be passed by it, tho' the parcels comprised are sufficient for more lands; and therefore, if a donor of 50 acres in *K.*, having other 50 acres there in fee, by fine grants 100 acres in *K.* to the donee, who renders 100 acres to the donor for life, &c. nothing shall be rendered but the 50 acres in fee. *R. Poph. 104.*

And a fine *sur grant & render* operates as a feoffment and re-feoffment. *R. 1 Sal. 337.*

But a render shall be transposed by construction, to make it effectual; as, if a fine be to *D.*, who renders a rent out of it, &c. to *A.* and *B.*, and the heirs of *B.*, and afterwards renders the tenements, one of which, &c. to *A.* and *B.* for life, remainder to *C.* in tail, remainder to the heirs of *B.*; it shall be a good render of the rent. *1 Leo. 255. Cro. El. 226.*

So, if a render be of a remainder to *A.* upon condition, and for default, &c. to *B.*; it shall be good. *Pl. Com. 34. b.*

(E 14.) *Sur concessit.*] So, a fine may be *sur concessit*, when tenant for life, or for years, grants his estate.

So, if he in remainder grants his estate to tenant for life. *2 Cro. 40.*

So, if *A.* and *B.* levy a fine to *C.*, who renders to *B.* in tail, and if he dies without issue, *quod tenementa integrè remanebunt* to *A.*, this operates as a fine *sur concessit* of the reversion to *A.* *R. Cro. El. 727. 792.*

A fine *sur concessit* grants only that which the party may lawfully grant; and does not divest the estates of others in remainder. *Semb. per two J. 2 Lev. 154.*

[Fine *sur concessit*, and fine *sur conusance de droit come ceo*, &c. cannot pass in one fine; if the caption is for both, one may be struck out. *Barnes, 216.*]

(E 15.) *How a fine executory shall be executed.*] A fine executory may be executed by entry, or by writ. *Vide West Symb. 57. Vide Execution, (A 6.)*

For the conusee may enter into the lands comprised in the fine. *Vide West Symb. 57.*

Or, within a year, may have an *habere facias seisinam*. *Vide West Symb. 57.*

And, after the year, a *scire facias*. *Vide West Symb. 58.*

A *scire facias* for executing a fine may be brought by the issue of tenant in tail. *West Symb. 58.*

Or, by him in remainder. *Co. Ent. 632. b.*

Or, by the heir of him in remainder. *West Symb. 59. a. Co. Ent. 625. 630.*

To a *scire facias* for executing a fine, the defendants may plead *quod partes finis nihil habuerunt*. *West Symb. 59. a. Co. Ent. 631. b. Vide post. (H 1.)*

*Quod partes finis habuerunt* only for life. *Co. Ent. 633. a.*

So, to a *scire facias* for executing a fine by the heir, the defendant may plead that the plaintiff is a bastard. *West Symb. 63. b.*

That another was heir, *cujus statum ipse habet*. *West Symb. 62. a.*

Until a fine be executed, non-claim to bar any stranger does not begin. *Pl. Com. 357. b.*

#### (E 16.) The Noté, and Foot of the Fine.

After conusance, and before the ingrossing of a fine, the chirographer makes a note of the fine, which contains an abstract of the original and the concord. *5 Co. 39. a.*

The



The office of chirographer is appointed by the king's patent. *Dy. 176. a. Vide Courts, (C 2.)*

If the writ of covenant with the *dedimus potestatem* be returned, the concord made, the king's silver paid, and the note of the fine made, the fine is then complete. *Semb. Pl. Com. 431.*

So, by the *st. 5 H. 4. 14.* writs of covenant, and other writs whereon fines be levied, with the *dedimus potestatem* if any be, the knowledges, and notes of the same, before they be drawn out of the Common Bench by the chirographer, shall be inrolled of record by the chief clerk, (*viz. the custos brevium,*) for the old fee of 22*d.* To the intent, that if the notes in the custody of the chirographer, or the fines, be embezelled, recourse may be to the said roll to have execution in the same manner as if the fines were not embezelled. *Vide post. (G 3.)*

And this is called the foot of the fine.

Which contains the day, year, and before whom levied. *5 Co. 39 a.*

### (F) Quid Juris clamat, &c.

**I**F a fine be of a reversion or remainder, if the particular tenant refuses to attorn, a *quid juris clamat* issues, before the ingrossing, out of the record remaining with the *custos brevium.* *West Symb. 47, &c. Pl. Com. 431. b.*

So, if a fine be of a rent, and the terre-tenant refuses attornment, a *quem redditum reddit* issues. *West Symb. 52. b.*

So, if a fine be of a feigniory, manor, &c. a *per qua servitia.* *West Symb. 53. a.*

So, tho' a fine be by one parcener, of her reversion to the other. *R. 3 Leo. 6.*

If the conusee dies pending the *quid juris clamat*, his heir shall have a new writ. *Cro. El. 693.*

But a *quid juris clamat* does not alter the fine, tho' the defendant has judgment for him.

And if he pleads to part that he himself has the fee, and attorns for the residue; the fine may be ingrossed for the whole. *R. Cro. El. 693.*

By the *st. 23 El. 3.* no attornment on a fine shall be entred on record, except the person, mentioned to attorn, appear in court in person, or by attorney warranted by hand of the judge, or justices of assise, on a writ of *quid juris clamat*, *quem redditum reddit*, or *per qua servitia*, as the case requires; and if entred, it shall be void, without error, &c.

But now, by the *st. 4 & 5 Ann. 16.* all grants and conveyances thereafter to be made of any matters or rents by fine or otherwise, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents, without any attornment of the tenants of any such manors, or of the lands out of which such rent was issuing, or of the particular tenant upon whose estate any such remainder, or reversion, was dependent.

## (G 1.) Proclamations, &amp;c.

BY the *ft. 27 Ed. 1. de finibus levatis, nota & fines in posterum levandi publicè & solemniter legantur, & placita interim cessant; & hoc fiat per duos dies in septimana secundum discretionem justiciariorum.*

By the *ft. 4 H. 7. 24.* a fine shall be read and proclaimed in court the same term, and in three terms next ensuing the ingrossing, and in four several days (but now, by the *ft. 31 El. 2.* only in one day) of the said terms, and the pleas then to cease.

And by the *ft. 1 Mar. 2 Parl. 7.* if the term be adjourned, a fine shall be of as good force, notwithstanding the neglect of proclamations by reason of such adjournment, as if the term had been held from the beginning to the end. *1 Leo. 84.*

So, if part of the term be adjourned.

If the consuee dies before proclamations, his heir, if he pleases, may cause proclamations to be made. *R. Cro. El. 693.*

A fine without proclamations makes a discontinuance, but does not bar an estate-tail.

So, a fine in *antient demesne*, *R. Lut. 781. 1 Sal. 340. Vide Antient Demesne, (G 2.)*

So, if a fine be determined or avoided before proclamations passed, it shall be of no effect, but as a fine without proclamations. *R. 2 And. 109. Pl. Com. 437. Vide Estates, (B 25.)*

## (G 2.) Ingrossing.

An immaterial variance in the ingrossment from the caption, or concord, signifies nothing; as, if the words are of the same import. *R. Cro. El. 275.*

So, a rent need not be mentioned in the ingrossment, if under *5 l.*; tho' it be in the writ and caption. *Ibid.*

## (G 3.) Inrolment, and Exemplification.

By the *ft. 23 El. 3.* every writ of covenant, and every writ whereon a fine shall be levied, and its return, the writ of *dedimus potestatem*, and its return, the concord, note, and foot of every fine, the proclamations thereon, and king's silver, may be inrolled, &c. *Vide ante, (E 16.)*

The justices of *C. B.* (exclusive of the *Ch. J.*) shall take care of the inrolments, have an office for that purpose, and take *6 s. 8 d.* for the inrolment, and *5 s.* for the exemplification of every fine. *Stat. 6.*

By the *ft. 27 El. 9.* the like inrolment may be of fines in *Wales*, and counties palatine.

## (H) A Fine, how avoided.

## (H 1.) By Plea.

A Fine may be avoided by plea, *quod partes finis nihil habuerunt. Vide ante, (E 15.)*

And therefore, if a fine be between *A.* and *B.* who were not seised of the lands contained in the fine at the time of the fine levied, a stranger to the fine may plead this plea. *2 Inst. 523.*

So, the son and heir of *A.*, if he was seised at the time of the fine, may plead it; for he is a stranger when he does not claim the land under

under his father, tho' he be privy in blood. 2 *Inst.* 523. 3 *Co.* 89. *Hob.* 333.

So, in every case, where the heir does not claim his estate from him to whom he is heir; for *heres dicitur ab hereditate*. 3 *Co.* 88. b. 89. a.

As, if the grandfather levies a fine of the land of B., his son, being heir also to B., may plead it, tho' he derives his pedigree by the grandfather. *Per two J. Jones cont. Cro. Car.* 524. 543. *Jon.* 460.

So, if tenant in tail accepts a fine, and thereby renders a rent to the conusor; the issue in tail may plead in avoidance of the fine, *quod partes finis nihil habuerunt*. 3 *Co.* 89. b.

So, if the tenant levies a fine executory; as, *sur consufance de droit tantum*. *Vide* 3 *Co.* 89. b.

So, if tenant for years levies a fine, he in reversion may plead, *quod partes finis nihil habuerunt*. 1 *Sal.* 241.

So, if tenant in tail dies, having a daughter, and his wife *privement enseint* with a son, and the daughter levies a fine; the son born after may plead, *partes finis nihil*, &c.; for he is a stranger. *Hob.* 333.

The form of pleading is not only, *quod partes finis nihil habuerunt*, but ought to allege, that A. was seised at the time of the fine, under whom he claims. 2 *Inst.* 523. *Lut.* 1623. *Vide post.* (H 2.)

Or, that he (or A. under whom he claims) was seised, *absque hoc quod partes finis aliquid habuerunt*.

Yet tho' seisin in A. be alleged, it is not traversable; but the issue shall be, whether the parties to the fine were seised. *Lut.* 1623.

And therefore, the tenant or defendant shall conclude to the country, *et de hoc ponit se super patriam*. 2 *Inst.* 523. *Lut.* 1623.

But by the *st.* 27 *Ed.* 1. *de finibus levatis* (which restored the common law) parties and privies to a fine are ousted of the plea, *quod partes finis*, &c. 2 *Inst.* 522.

And therefore, if tenant in tail levies a fine *sur consufance de droit come ceo*, &c. the issue in tail cannot say, *quod partes finis nihil habuerunt*; for he is privy; for he claims as heir, and by descent. R. 3 *Co.* 89. b. 90. a. R. 1 *Leo.* 83. 1 *And.* 170. *Sav.* 88.

So, in no case, where the issue claims as heir to the tenant in fee, or the tenant in tail, who levied the fine. 1 *Leo.* 83.

So, if a devise be, that his executor shall sell, who levies a fine to B., and it be said, *quod partes finis nihil habuerunt*; the vendee may aid himself by the special matter; for he is in by the will. 1 *Leo.* 31.

So, if the issue in tail takes husband, and they levy a fine in the life of the ancestor, and afterwards the husband dies, the wife takes a second husband, and dies; the second husband shall not say, *partes finis nihil habuerunt*, to preserve his estate as tenant by the curtesy, tho' he was a stranger to the fine; for he claims by her who was a party. 1 *Leo.* 82.

(H 2.) *How a fine shall be pleaded.*] A fine shall not be pleaded, that A. levied a fine, &c. but *quidam finis se levavit*, &c. 2 *Inst.* 511.

Or, it may be, *et fuit quadam finalis concordia*, &c. 2 *Lev.* 31. R. *Pl. Com.* 431. b.

Neither is there any need to allege that A., who levied the fine, was seised in fee, or of any other estate. *Semb.* *Lut.* 1622. 1 *Leo.* 255.

Or, if it be alleged, it is not traversable. R. *Lut.* 1621. for it is but form. *Sav.* 85. Yet



Yet it is the most usual form to allege it. *Lut.* 1621.

And in a fine *sur conusance de droit tantum*, it ought to be alleged. *Lut.* 1622.

So, it need not be alleged before what justices the fine was acknowledged. *Pl. Com.* 105. a.

Or, that a *feme-covert* was examined. *Pl. Com.* 105. a.

Or, that the party barred by it was of sound mind, of full age, at large, &c. *Pl. Com.* 376. a. *R.* 1 *Leo.* 76. *Semb.* 85.

is Or, that it was in *C. B.*; for, *coram iusticiariis domini regis apud W.* usual, and well. *Pl. Com.* 431. b.

Or, that it was ingrossed. *Semb. And. cont.* 1 *Leo.* 76, 7. *Sav.* 85.

So, if a fine was acknowledged in *Hilary* term, and recorded in *Easter*, it may be pleaded, *quidam finis se levavit termino Sancti Hilarii*; for it was a fine before the ingrossing. *Semb. Pl. Com.* 431. b. 1 *Sal.* 341.

Or, it may be alleged specially, as the truth was. *Pl. Com.* 431. b. 1 *Leo.* 76.

Or, *quidam finis se levavit term Hil. & postea term. P. concess. & recordat.* *Bend. pl.* 141.

So, it may be pleaded, *prout per finem de recordo hic remanen.*, &c. without adding, & *per proclam.* 1 *Leo.* 77. *Sav.* 85.

So, *prout patet per finem de recordo*, &c. may be omitted. 1 *Leo.* 77. *Sav.* 85.

But it is not proper to plead a fine of such land, *inter alia.* 1 *Leo.* 255.

[In proving a fine, it must be shewn that the conusor was in possession, or had received rent. *Cowp.* 622.]

#### (H 3.) By Writ of Error.

(H 3.) *What shall be error.*] So, a fine may be avoided by writ of error; as, if it be levied in *B. R.* or other court of record, which has not power to hold plea of it. 2 *Inst.* 515. *Vide ante* (D).

Or, without an original writ. 2 *Inst.* 513. *Vide ante*, (E 1.)

So, error lies of a fine in *B. R.* which *coram vobis residet.* *R.* 1 *Sal.* 337.

(H 4.) *By whom error shall be sued.*] Error in a fine ought to be sued by some entitled to it. *Vide Pleader*, (3 B 9.)

So, by a privy in estate; as, by him in reversion, or remainder, after an estate-tail; for the reversion or remainder was discontinued by the fine. *R.* 2 *Jon.* 182.

And if several persons join in a fine, he only who has a prejudice by the fine, and an interest in the land, shall have error, without the others. *R.* 2 *Jon.* 182.

(H 5.) *How it shall be pursued.*] If error be in a fine, a writ shall be directed to the Ch. J. of *C. B.* to certify the record and process of the fine, another writ to the *custos brevium* to certify the transcript of the foot of the fine, another writ to the chirographer to certify the record and process of the fine in his custody. *West Symb.* 71.

And only the transcript shall be removed. 1 *Sal.* 337. 341.

So, there ought to be a *scire facias* against the terre-tenants; for tho'

tho' it is not by law required of necessity, yet it is requisite by the course of the court. *R. 1 Sal. 339. 598.*

(H 6.) *What is not error in a fine.*] But by the *st. 23 El. 3.* no fine shall be reversed for false or incongruous *Latin*, razure, interlining, mis-entry of any warrant of attorney or proclamations, mis-return, or non-return of the sheriff, or other want of form in words, and not in substance.

(H 7.) *Judgment for reversal, &c.*] If a fine appears to be erroneous, judgment shall be for a reversal.

So, *B. R.* may award a *certiorari* to the chirographer for the fine itself, which shall be cancelled there. *1 Sal. 341.*

So, if a fine be levied by a counterfeit person, a *vacat.* may be entered on the roll. *Cro. El. 531.*

So, it may be reversed for part. *R. Cro. El. 469.*

Or, against one conusor, and shall stand in force against the other; as, if an infant tenant in tail, and he in remainder of full age, join in a fine; it may be reversed as to the infant only. *1 Leo. 115.*

So, if tenant in tail and others join; it may be reversed against the tenant in tail only, and as to the land entailed. *R. 2 Jon. 182.*

So, if husband and wife within age levy a fine; upon the special matter, it may be reversed as to the wife only. *Semb. 1 Leo. 115.*

But, generally, it shall be reversed for the whole; for when husband and wife join in a fine, *prima facie* it shall be intended the inheritance of the wife. *R. 1 Leo. 115.*

#### By Claim.

[When there is a fine and non-claim, the court will not enter into any discussion of title, till that be accounted for. *2 Bl. Rep. 1259.*]

[A bill in *Chancery* is not a claim to avoid a fine. *2 Bl. Rep. 993.*]

When a fine may be avoided by claim, *vide Claim*, (B 1, &c.)

### (I) Who are barred by a Fine.

#### (I 1.) Parties and Privies.

**A** Fine is a final bar to all parties and privies to the fine. *2 Inst. 516.*

And therefore, if a man levies a fine, the conusor, and all who claim the estate as heir to him, are barred for ever. *R. 2 Co. 55.*

Tho' the conusor was tenant in tail, the issue in tail shall be barred. *19 H. 8. 7. a. R. Dy. 3. a. R. Sav. 88. Vide Estates*, (B 25.)

[If lands are limited to *A.* for life without waste, then if *B.* his wife survive and have issue living, *B.* to have a rent-charge of 20*l.*, and after the death of both, *this same rent-charge* to the heirs of the body of them; and afterwards *A.* and *B.* levy a fine of the lands; the rent-charge is well barred, *B.* being tenant in tail. *Whitfield v. Fauisset, H 1749, 1 Vesey, 387.*]

So, a privy, as an heir by the custom, shall be barred; as, an heir of lands of the nature of *gavelkind*, or *borough-english*. *2 Inst. 516.*

So, a privy; tho' the estate was in contingency, and not vested at the time of the fine. *R. Pol. 66.*

Or,

Or, not commenced, if he afterwards survives the age at which his estate commences. *R. 3 Leo. 227.*

So, a privy in estate by succession; as, if an abbot, bishop, &c. levy a fine, his successor shall be barred. *2 Inst. 516. Cont. Pl. Com. 375. Acc. 1 Leo. 84. Vide post. (K 4.)*

So, if the conusor grants a term for years to *A.* in trust for himself, it shall be a bar of the trust. *1 Ch. R. 50.*

So, a fine *sur grant & render* for years, by a tenant in tail, shall be a bar to the issue in tail. *Sav. 106.*

So, if *A.* enters into land, devised to the corporation of *London* for a charity, and levies a fine, and five years pass; the corporation shall be barred, tho' it had no notice of the devise. *R. Jon. 452.*

But a man shall not be barred as privy, who does not claim the estate as heir to the conusor, tho' he was his heir in blood; and therefore, if the uncle disseises the father, and both die after a fine levied by the uncle; the son shall not be barred, tho' he was heir to the uncle; for he claims as heir to the father, and not as heir to the uncle.

So, he shall not be barred as privy, who is only privy in estate; as, a fine, by one joint-tenant, of the whole, does not bar his companion as privy. *2 Inst. 516.*

So, a fine by a donee, or lessee, does not bar the donor, or lessor. *Ibid.*

So, a fine by tenant for life does not bar his heir, who has the remainder in tail. *Sav. 128.*

### (I 2.) Strangers.

(I 2.) *For what interest.*] So, a fine bars not only parties and privies, and their heirs, but all other people in the world, of full age, &c. who do not make claim, &c. *ft. 18 Ed. 1. de modo levandi fines. St. 27 Ed. 1. De finibus levatis. Pl. Com. 357.*

And therefore, not only estates of inheritance and freehold are barred by a fine, but also leases for years. *2 Inst. 517. R. 5 Co. 124.*

The estate of tenant by statute-merchant, or statute-staple. *2 Inst. 517. R. 5 Co. 124. Sho. 40. Skin. 262.*

And of tenant by *elegit.* *1 Mod. 217.*

If the statute be extended, or an inquisition found, before entry. *1 Mod. 217.*

So, all interests which are vested, and *in esse*; as, a copyhold, or customary interest. *R. 9 Co. 105. Vide Copyhold (N).*

The interest of an executor, who has land for payment of debts. *5 Co. 124.*

If *cestuy que trust* of a term purchases the inheritance, and levies a fine, the lessees shall be barred. *R. Cro. Car. 110. R. 1 Sid. 458.*

*1 Vent. 56. 81. 2 Vent. 329. 1 Lev. 270. Carth. 102.*

So, the interest of a lessee for years before entry. *R. 5 Co. 124. 2 Cro. 60.*

So, if a lease be to commence *in futuro*, and a fine passes, and then the lease commences before the five years pass after the fine; it shall be barred, if it be not claimed. *Per three J. 2 Cro. 60.*

So, the estate of a devisee, if a fine be levied by the heir, before entry. *R. Cro. Car. 201.*

So,



So, a title to dower is barred by a fine of the husband, tho' it is not consummate till the death of the husband after the fine. *Somb. Dy.* 224. *Dub. Pl. Com.* 373. *a.* *Acc.* 2 *Co.* 93. *a.* 10 *Co.* 49. *b.* 99. *a.* *R. Mo.* 53.

So, a title to be tenant by the curtesy, by a fine with his wife. *Adm.* 5 *Mod.* 67.

So, a title of entry for a condition broken. *R. Cro. Car.* 577.

So, a title of a lessee who never was in possession, but named as a trustee for the wife of the conusor of the fine. *R. 1 Ch. R.* 64.

So, if a conveyance be obtained from *A.* by indirect means; a fine and non-claim afterwards shall be a bar to relief in equity. *R. Jon.* 416.

So, a title to a writ of error shall be barred by a fine, and non-claim for five years. 2 *Inst.* 518. *R. Mo.* 366.

And a title to a writ of deceit, by the lord in *antient demesne*. 2 *Inst.* 518.

But this is understood of a subsequent fine; and not of the same fine intended to be avoided by the writ of error, or deceit. *R. Skin.* 13. *Ray.* 462. 2 *Jon.* 181. *Pl. Com.* 370. *b.* 1 *And.* 172.

So, a trust shall be barred by a fine; as, if a devise be of land charged with portions, &c. and the devisee levies a fine to *A.*, &c. the portions incurred after the fine are barred. *R. 2 Ca. Ch.* 247. *R. 1 Ca. Ch.* 268. 278. If it be without notice. 2 *Ca. Ch.* 125. *Eq. Abr.* 257.

So, an equity of redemption. *Per Hale, Hard.* 512. 2 *Ver.* 190. *Cont. Eq. Abr.* 257.

So, a bill of review. 2 *Ver.* 190.

[Non-claim on a void fine is of no effect. *E. Pomfret v. Ld. Windor*, *T.* 1752, 2 *Vesey*, 472.]

(I 3.) *For what, not.*] But an interest not vested shall not be barred by a fine; as, if a lease be made to commence *in futuro*, a fine and five years non-claim, before the term commences, is not a bar. *R. 5. Co.* 124. 2 *Cro.* 61. *Noy*, 23. *Per Hale, Hard.* 413.

So, if a statute be acknowledged, a fine by the conusor of his land, and five years non-claim, does not bar, if the statute was not extended. 1 *Mod.* 217.

Or, judgment be suffered. *Ca. Ch.* 268.

Or, a decree in *Chancery* be against him who levied the fine. *Ibid.*

So, nothing shall be barred by a fine and non-claim, which is not divested, and put to a right. *R. 9 Co.* 106. *a.* 3 *Mod.* 196. *Ray.* 149.

And therefore, if a lessee for years levies a fine, and five years pass, the lessor shall not be barred; for his estate was not divested, but *partes finis nihil habuerunt*. *Hard.* 401.

If a lease for life be to *A.*, remainder to *B.* for years, remainder to *B.* in fee; if *B.* levies a fine, the estate for life of *A.* shall not be barred; for it was antecedent, and not divested. *Hard.* 402.

So, if a man has a rent, or common, issuing out of land, a fine and non-claim of the land does not bar the rent, common, &c. for it was not divested. *Vide Pl. Com.* 435.

[If lands are limited to the use of *A.* for life, without waste, and if *B.* his wife survive him, and have issue then living, then she to have a rent-

a rent-charge of 20 *l.*, and from the death of both the heirs of the body of them to have one annuity of 20 *l.*; these are two distinct rents (*semb.*); and therefore, a fine by *A.* and *B.*'s no bar to the rents to the heirs of the body, which is in the nature of a springing use of the rent, not arisen, but a mere possibility, which cannot be barred. *Whitfield v. Fauisset*, *H.* 1749, 1 *Vesey*, 387.]

So, a fine by a vendee of tenant in tail of the gift of the king, the reversion being in the king, and non-claim for five years, does not bar the issue in tail. *Semb.* 1 *Sid.* 166. *Vide Estates*, (B 31.)

So, if there be a devise for years for payment of debts and legacies, remainder to *B.* in tail, who enters and pays several, and afterwards levies a fine; this does not bar the term. *Dub.* 3 *Mod.* 195. *Sho.* 73.

[If trustees, in whom the legal estate is, on several trusts, particularly to raise money, suffer one in remainder to continue in possession of the estate; he is only tenant at will to them, and a fine levied by him is void. *Earl Pomfret v. Lord Windsor*, *T.* 1752, 2 *Vesey*, 472.]

[If a share in the *New River* is settled on *A.* for life, with remainders over; and on his death, his heir having the settlement conceals it, and claims a right to it, as if no settlement made, and levies a fine of it, and then receives the dividends; this is not a seizure to warrant the fine, and it has no operation to alter the right of the parties. *Lord Townsend v. Windham Ass.*, *P.* 1745, 3 *Atkyns*, 336.]

So, if a fine be levied by lessee for life, or years, and he continues the payment of the rent, &c. it does not bar: for it would be fraudulent. *R.* 3 *Cro.* 77. *Fermor.*

If a mortgagor levies a fine, and he continues in possession, and five years pass; the mortgagee shall not be barred: for the fine was fraudulent as to him. *Per Ch. J.* 1 *Vent.* 82. *Per Hale*, *Hard.* 402.]

If *cestuy que trust* of a term purchases the inheritance, and levies a fine, and the intent appears, that the term shall be preserved to protect the purchaser; the term is not barred. 1 *Vent.* 82. 1 *Sid.* 460. *Per Vent.* 2 *Vent.* 329. *Hard.* 401.

If *A.* conveys to *B.* and covenants to make further assurance, and afterwards *B.* leases for years to *A.* who makes assurance by fine; if the intent appears, that the term shall be preserved, it is not destroyed by the fine. *Hard.* 402.

If a trustee, or mortgagee levies a fine, the trust, or equity of redemption, shall not be barred. *Per Hale*, *Hard.* 512.

So, a trust or equity, created by a fine and the uses declared upon it, shall never be barred by the same fine and non-claim. *R. Ca. Ch.* 278.

So, a fine and non-claim shall not be a bar of an equity, which does not directly charge the land in the fine, but only the person in respect of the land. *R. Ca. Ch.* 278.

### (K) Who are not barred.

(K 1.) If they claim within five Years.

**BY** the *st.* 18 *Ed.* 1. *de modo levandi fines*, all were barred by a fine, if they did not put their claim within a year and a day; and this was the common law. 2 *Inst.* 518.

But, by the *ſt.* 34 *Ed.* 3. 16. non-claim upon a fine was not a bar.

Yet, by the *ſt.* 4 *H.* 7. 24. a fine, &c. ſhall conclude all, as well privies as ſtrangers, &c. ſaving to every perſon and perſons and their heirs, other than the parties, ſuch right, claim, and intereſt, as they have to or in the ſaid lands, &c. at the time of the fine ingroſſed; ſo as they purſue the ſame by action or entry within five years after the proclamations made.

And therefore, every ſtranger to a fine, who has a preſent right to the land at the time of the fine levied, ſhall not be barred, if he purſues his claim, by action or entry, within five years after the proclamations made upon the fine.

But, a man who has a preſent right, ought to claim within five years, otherwiſe he ſhall be barred; as, if a leſſee for years be ouſted, and his leſſor diſſeiſed, and the diſſeiſor levies a fine; the leſſor ought to claim within five years: for he had a preſent right. *R.* 9 *Co.* 105. *b.* *Podger.* *Vide poſt.* (K 2.)

So, if a copyholder for life, or years, be ouſted, and the lord diſſeiſed, and the diſſeiſor levies a fine; the lord ought to avoid it within five years; for he has a preſent right. 9 *Co.* 105. *b.*

If tenant in tail be diſſeiſed, and the diſſeiſor levies a fine, and five years paſs; the iſſue in tail ſhall not have five years after the death of tenant in tail: for his father had a preſent right to the entail. *Pl. Com.* 374. *a.*

(K 2.) Or within five Years after a new Right accrued.

So, by the *ſt.* 4 *H.* 7. 24. a fine ſhall conclude, &c. ſaving to all perſons ſuch action, right, &c. as firſt ſhall grow, remain, or come to them after the ſaid fine levied and proclamations made, by force of any entail, or other matter had before the ſaid fine; ſo as they purſue their action, right, &c. within five years next after ſuch action, right, &c. accrued.

And therefore, none who has a right accrued after the fine, for a cauſe done before the fine, ſhall be barred, if he claims within five years after the new right accrued.

As, if tenant in tail levies a fine, and dies without iſſue; he in re- verſion, or remainder, ſhall not be barred, if he claims within five years after the death without iſſue.

If tenant in tail, by bargain and ſale, leaſe and releaſe, &c. conveys to *B.* who levies a fine; the iſſue ſhall have five years after the death of tenant in tail. *R.* *Gro. El.* 896. *Noy.* 46.

If tenant in tail diſcontinues, and the diſcontinuee levies a fine; the iſſue in tail ſhall have five years after the death of tenant in tail. *Dy.* 3. *b.* *Pl. Com.* 374. *a.* 3 *Co.* 87. *b.*

If a mortgagee be diſſeiſed, and a fine levied, and five years paſs, and afterwards the mortgagor pays the money at the day; he ſhall have five years after the money paid. *Pl. Com.* 373. *a.*

If a huſband be diſſeiſed, and a fine levied; the wife ſhall have five years, after the death of her huſband, for her dower. *Pl. Com.* 373. *a.*

If tenant for life, remainder to *A.* in fee, be diſſeiſed, and a fine levied; he in remainder ſhall have five years after his remainder commenced. *Pl. Com.* 373. *b.*

If a perſon *non-compos* enfeoffs *A.*, who levies a fine; the heir ſhall have five years after the death of the feoffor. *Pl. Com.* 374. *b.*

If



If a son purchases, and dies, and his sister enters, and is disseised, and a fine levied; a brother born afterwards shall have five years after his birth. *Pl. Com. 374. b.*

If an officer for life levies a fine of lands appertaining to his office; his successor shall have five years after his death. *Pl. Com. 538. b.*

So, if a man has a present right at the time of a fine, and afterwards a new right accrues; he shall have five years after the new right accrued: as, if tenant for life levies a fine, and afterwards dies; tho' the lessor had a right at the time of the fine, for the forfeiture, yet he shall have five years after the death of the lessee. *Per Dyer, Mo. 71. R. Cro. El. 220. 254. Cont. Pl. Com. 373. b. Agreed Cro. Car. 157. Dy. 3. b. in marg. R. acc. 1 Lev. 212.*

So, if a lessee for years makes a feoffment, and the feoffee levies a fine; the lessor shall have five years after the expiration of the term. *R. 1 Vent. 241. Ray. 219. 2 Lev. 52. Cont. Pl. Com. 374. a. Vide ante, (K 1.)*

So, if a lessee of a future term dies, and the prior term expires, then the lessor enters, and levies a fine, and five years pass, and then *B.* takes administration to the lessee; he shall have five years afterwards; for no one had title till administration. *R. 2 Cro. 60.*

If *A.*, tenant *pur autre vie*, remainder to *B.* for life, remainder to *A.* in fee, be disseised, and the disseisor levies a fine, and five years pass, then *B.* dies; *A.* shall have other five years for the remainder in fee. *Per four J. two cont. Pl. Com. 367. b. 372. b.*

If a husband discontinues land of his wife, upon a condition, which is broken, and then five years pass after a fine; the issue, barred of entry for the condition broken, shall have other five years after the death of his mother, for the discontinuance. *Pl. Com. 367. b.*

If a disseisor takes to wife the disseisee and is disseised, and a fine levied; their issue after five years after the fine, shall have other five years after the death of his father, as heir to the disseisee. *Pl. Com. 367. b.*

If a statute be acknowledged to *A.*, and afterwards another to *B.*, and afterwards a fine levied; if the statute to *A.* be satisfied, *B.* shall have other five years. *R. Skin. 263, 4. Vide infra.*

But, a man shall be barred, if he does not pursue his claim within five years after his right accrued.

And if he, to whom the right first accrues, does not pursue his right within five years; his heirs shall be barred.

So, if he to whom the right first accrued, had only in tail, and did not pursue within five years; the issue shall be barred. *R. Dy. 3. b. Pl. Com. 374. Acc. Cro. El. 896. 3 Co. 87. b.*

So, if he who has a right dies within five years, his heir within age, beyond sea, &c. shall be barred, if he does not pursue within the first five years: for, where the time attaches in the ancestor, the heir, tho' an infant, &c. shall never have longer time. *R. Pl. Com. 375.*

So, if *A.* makes a lease for years, remainder after his death, to *B.* for years, and afterwards levies a fine; admitting this to be a good contingent remainder, not divested by the fine, yet if *B.* does not claim within five years after the death of *A.*, he shall be barred. *R. Ray. 151.*

So, a man shall be barred, if he does not pursue his right within five years after the accruing, tho' he had not then a right to the pos-

session:

session: as, if tenant in tail makes a lease pursuant to the *ſt.* 32 *H.* 8. and then levies a fine, and dies without issue, and afterwards the lease expires; the reversioner ought to enter within five years after the death without issue, and shall not have five years after the term expired; for he had not then a new right. *R. Cro. Car.* 156.

If the conusee of a statute purchases the inheritance and levies a fine, and then satisfaction is acknowledged upon the statute, a conusee of another statute shall not have five years after satisfaction acknowledged: for he had not then any new right. *R. 2 Vent.* 334. *Vide Skin.* 263, 4. *Vide supra.*

So, if the impediment be removed only for a month, or a week, and afterwards a new defect, or impediment, happens; the fine shall be a bar, if there be not a claim within five years after the first removal of the impediments. *Pl. Com.* 375. *a.*

So, exceptions out of the *ſt.* 4 *H.* 7. shall not be taken by equity. *Pl. Com.* 375. *a.*

(K 3.) If they be an Infant, *Feme-Covert*, &c.

By the common law, and by the *ſt.* 18 *Ed.* 1. *de modo levandi fines*, infants, *femes-covert* not examined upon the fine, persons of unsound memory, or in prison at the time of the fine, were not barred. *Pl. Com.* 359. *b.*

Nor, persons out of the realm.

So, by the *ſt.* 4 *H.* 7. 24. a fine shall conclude, &c. all except *femes covert* not parties, persons within age, in prison, out of the realm, or not of whole mind at the time of the fine levied, so as they, or their heirs, take their action or entry in five years next after they be uncovered, come of age, out of prison, into this land, or of whole mind.

And if the person was covert and not party, within age, in prison, out of the realm, or not of whole mind, when the right first grew or came, &c. they shall have five years after they become discovered, &c.

[When once the five years, allowed to an infant, begin, the time continues to run, notwithstanding any subsequent disability. *Doe v. Jones*, *B. R. T.* 31 *Geo.* 3. 4 *T. R.* 300. *Doe v. Shane*, *B. R. M.* 28 *Geo.* 3. 4 *T. R.* 306. *n. (b).*]

And if a person has several impediments; he shall have five years after the last impediment removed. 1 *Leo.* 215. *Pl. Com.* 375. *a.*

So, if a person becomes covert or under any other impediment, before the last proclamation; they shall have five years after the impediment removed, tho' they were not under it at the time of the fine levied. *Pl. Com.* 375. *a.*

So, an infant shall have five years after full age, tho' the fine was levied when he was *en ventre sa mere*. *Pl. Com.* 366. *a.*

So, if the ancestor was within age, beyond sea, &c. and died before full age, or return, his heir shall have five years after his death. *R.* 1 *Leo.* 212. *Cro. El.* 220.

[*A.* seised in fee of lands dies, leaving *B.* his heir a *feme-covert*; upon his death a stranger makes a tortious entry on the lands, continues in possession and levies a fine *sur conusance de droit come ceo* with proclamations. *B.* afterwards dies under *coverture*, no entry having been made on her behalf to avoid the fine, leaving *C.* her heir of the age of twenty-one, of sound mind, out of prison, and within the realm. The fine is a bar to the right of *C.*, unless he make his claim within five

five years after the death of B. *Dillon v. Leman, C. P. M. 36 Geo. 3. 2 H. Bl. 584.*]

So, if an heir, at the death of his ancestor beyond sea, &c. be within age, &c. he shall have five years after his full age. *1 Leo. 212.*

So, if a husband levies a fine, and is outlawed for treason, and dies, and afterwards the outlawry is reversed; the wife shall have dower five years after the outlawry reversed, tho' ten years be passed after the death of the husband. *R. Mo. 639.*

(K 4.) If the Case be out of the Statute.

If an infant dies during his infancy, his heir shall have time to avoid the fine for ever: for he was excepted out of the *st. 4 H. 7.* and was not within the clause, which binds to claim within five years after he comes to full age; for he never was at full age. *R. 4 Co. 125. b. 2 Inst. 519. Semb. cont. Cro. Car. 200.*

So, if a *feme-covert* at the time of a fine, a man *non sane*, in prison, or out of the realm, dies during the coverture, insanity, imprisonment, or absence out of the realm; the heir is not within the act, but may avoid the fine at any time. *4 Co. 125. b. 2 Inst. 519.—Cont. 1 Leo. 212.*; for he shall have but five years after the impediment removed. *1 Leo. 215.*

So, the successor of a bishop, dean, parson, &c. shall not be bound by non-claim within five years; for a bishop, dean, parson, or other ecclesiastical sole corporation, is not within the purview of the act. *Pl. Com. 375. b. Vide ante, (I 1.)*

So, if an infant avoids a fine within age, and a disseisor afterwards enters, and enjoys for ten years; it shall not be a bar; for when he had avoided the fine, it shall be void for ever. *Pl. Com. 366. a.*

And it may be avoided by an infant within age, as well as at full age. *1 Leo. 212.*

How a claim shall be made to avoid a fine, and by whom, *vide Claim, (B 1, &c.)*

### (L) How a Fine operates.

[A Fine, and deed to lead the uses are to be considered as one conveyance. *Doug. 45. 2 Willf. 220.* And therefore the fine operates according to the declaration of uses.]

[But a fine *sur consuſance come ceo*, &c. without consideration or uses declared, whether the conuſor is in possession, or the fine is of a reversion, enures to the old uses, and the conuſor shall be *in* of the old use; and tho' it passes nothing, yet after five years, and non-claim, it operates as a bar. *Armstrong v. Wolfey, H. 28 G. 2. 2 Willf. 19.*]

[Yet, where no uses are declared, parol evidence may rebut the resulting use to the conuſor in favour of the conuſee, without any written declaration of uses in his favour; for the statute of frauds extends, in the case of fines, to third persons only, and not to the conuſors and conuſees of the fine. *Doug. 25.*]

A fine may enure to a confirmation of a former estate, which was defeasible before: as, if tenant in tail by bargain and sale, lease and release, &c. conveys to B. in fee, and afterwards levies a fine to P. and his heirs; this gives him a base fee determinable upon his death without issue. *Vide 1 Sand. 261.*



So, if he levies a fine to the heir of the bargainee. 1 *Sand.* 261.

So, if tenant in tail makes a lease, &c. and afterwards levies a fine to the lessee, or a stranger; this enures to a confirmation of the lease. *Vide Estates*, (B 25.)

[If a marriage-settlement by lease and release has a covenant to levy a fine, which is done afterwards in the same term, and after the marriage, the operation of the deeds and of the fine shall not be divided, and considered distinctly; the deeds were incomplete, and only executory till the fine is levied; they operate as declarations of the uses which arise out of the fine which passes the estate, and all shall be taken together as one and the same assurance. *Doe v. Whitehead*, H. 32 G. 2. 2 B. M. 704.]

So, if a husband, seised in right of his wife, makes a lease not warranted by the *ft.* 32 H. 8. and afterwards the husband and wife levy a fine to B., the lease shall be confirmed, and the lessee shall hold during the term. *Per Gawdy, Wray cont.* 4 *Leo.* 15.

But such subsequent fine has not relation to affirm the first estate *ab initio*. And therefore, if tenant in tail bargains and sells lands to B. and his heirs, B. dies, and afterwards he levies a fine to his heir; this has not relation to make a devise of B. to be good. R. 1 *Sand.* 261.

So, a fine may enure by way of extinguishment: and therefore, if tenant in tail makes a lease, or other estate, to A., and afterwards levies a fine to B., the lease or other estate shall be indefeasible; for his right during such former estate was extinct by the fine. R. *Jon.* 60. 2 *Cro.* 689. *Vide Estates*, (B 25.)

[If lands are devised to A. and B. and the survivor, and his heirs, in trust to sell, A. and B. by fine may pass a good title to a purchaser by way of *estoppel*; per *Talbot C.* who cited *Weale v. Laver, Polexfen*, 54. that a fine passes an estate not vested by way of *estoppel*, and conveys the interest of such estate accruing by contingency happening afterwards. *Vick v. Edwards*, T. 1735, 3 *P. W.* 372.]

So, if the issue in tail levies a fine, and before, or afterwards, the tenant in tail makes an estate by lease, or otherwise. R. *Jon.* 60.

So, if tenant in tail covenants to stand seised to the use of himself for years, and afterwards to his son for life, remainder over, and then levies a fine to a stranger. *Dub.* 2 *Lev.* 84.

So, if a disseisor levies a fine without declaring any use, it enures to the benefit of the disseisor. R. 2 *Co.* 56. a. *Adm.* 1 *Lev.* 128.

But if tenant for life be disseised, and afterwards he in reversion levies a fine to B.; this shall not enure to the benefit of the disseisor, but to the conusor. *Semb. cont.* 2 *Co.* 56. a. *Acc. per two J. Cro. Car.* 484.

So, if a disseisor levies a fine to B., and declares the use to him; it does not enure to the disseisor. *Per Bridgm.* 1 *Lev.* 128.

#### [(M) When a Fine shall be amended.]

[Where a fine is taken from a dying woman of lands of her inheritance, and the deed to lead the uses is colourable, the court will not, after her death, permit the fine to be amended in the return-day of the writ of covenant; whatever they might do in a fair case. 2 *Bl. Rep.* 1013.]

[While the parties are alive, the court will not grant leave for the amendment]

amendment of a fine, in the Christian name of the plaintiff, for that amounts to making a new fine. 2 *Bl. Rep.* 816.]

[Neither, while the parties are alive, will they permit the fine to be amended in the term. 2 *Bl. Rep.* 788. 3 *Wilf.* 249, 250.]

[Where the deed to lead the uses is general, and it appears only by affidavit that the intent was to levy the fine of a greater number of acres than it mentions, the court will not permit an amendment, to increase the number of acres. 2 *Bl. Rep.* 102, 3.]

*Vide* more concerning *Fine*, in *Amendment* (N).—*Baron and Feme*, (G 1.)—*Chancery*, (3 N 1, 2.)—*Enfant*, (B 2.)—*Pleader*, (2 Y 14.)

## FINES AND AMERCIAMENTS.

*Vide Chancery* (3 K).—*Chimin*, (C 13.)—*Copyhold*, (H 1, &c.)—(M 4.)—*Lect*, (H—N 1, &c.)—(O 1, &c.)—*Parliament*, (H 8.)—*Prærogative*, (D 51, &c.)—*Sewers*, (E 7.)

## FIRST-FRUIT.

*Vide Tenths.*

## FISHING.

*Vide Justices of Peace*, (B 44.)

## FLEET.

*Vide Chancery*, (B 8.)—*Imprisonment* (D).

## FLOTSAN.

*Vide Wreck* (A).

## FOLDAGE.

*Vide Action upon the Case for a Disturbance*, (A 4.)

## FOLK MOTE.

*Vide Courts*, (O 7.)

## FORBEARANCE.

*Vide Action upon the Case upon Assumpsit*, (B 1.)

## FORCIBLE ENTRY.

### (A) Forcible Entry.

(A 1.) How restrained.

**B**Y the *ſt.* 5 *R.* 2. 8. none ſhall enter into lands, &c. but when the entry is legal; and then in peaceable manner, and not with ſtrong hand, or multitude.

By the *ſt.* 15 *R.* 2. 2. on complaint of forcible entry into lands, O 4  
benefices,

benefices, or offices of holy church, the justices of peace with the *posse* of the county shall go to the place, &c. and if they, or he, find any hold forcibly, shall commit them to the next gaol, till, convicted by record of such justices, they make fine and ransom.

And all of the county, and the sheriff, shall assist, &c. on pain of fine and ransom.

By the *stat.* 8 *H.* 6. 9. on complaint of forcible entry, or detainer, the justices of the county, or mayor or justice in a corporation, at the costs of the party, shall cause these statutes to be executed.

And whether the persons be present, or gone, shall inquire, &c. of such forcible entry, or detainer.

So, by the *stat.* 21 *Jac.* 1. 15. the justices shall give the same remedy for forcible entry, or detainer, on a term for years, copyhold, land held by *elegit*, statute-merchant, or staple, or guardian in *chivalry*, as on freehold.

And these statutes extend, where the entry, or detainer, is with force. *F. N. B.* 248. C.

So, if the entry, and also the detainer, be forcible; tho' the statute speaks in the disjunctive. *F. N. B.* 248. D. 19 *H.* 6. 32. a. *R. Mar.* 6.

(A 2.) What shall be.

Forcible entry is, when a man enters into lands or tenements *manu forti*: as, if he brings unusual weapons. *Co. L.* 257. b. *H. P. C.* 138.

Or, threatens violence. *Ibid.*

Or, breaks the door of the house, being lockt. *H.* 138.

Or, ejects the possessor with violence. *Ibid.*

So, if he enters into a church with force. *R.* 1 *Sid.* 101.

1 *Lev.* 90.

And one alone may make a forcible entry. *H.* 138.

Tho' it be an infant, or *feme-covert*. *Vide Cromp.* 69. a. b.

So, if one alone uses force, all in company are guilty. *Co. L.* 257. b.

If he breaks the door, and enters, tho' nobody be within the house. *R.* 2 *Roll.* 2.

So, it shall be a forcible entry, if it be attempted with force, tho' obtained by intreaty.

If he enters by force, tho' he does not eject the owner, nor continue in possession.

If he enters by force to make a distress for rent due. *Vide Cromp.* 69. b.

Or, to take grass, corn, &c. *Vide Dalt. c.* 125. *Crompt.* 68.

If he be accompanied, or weaponed, in such a manner that people may dread force, tho' he does not use force.

So, it shall be a forcible entry, if he enters with a multitude. *H. P. C.* 138.

The number of 10 makes a multitude: but what shall be so, lies in the discretion of the justices. *Co. L.* 257. a.

If a master enters with an unusual number of servants. *Co. L.* 257. b.

(A 3.) What not.

But it shall not be a forcible entry, if there be not an actual entry.  
So,



So, if he does not enter forcibly; as, if he opens the door with a key. *2 Rol. 2.*

Or, enters by an open window. *2 Rol. 2.*

Or, if the entry be without semblance of force; as, if a man comes in a peaceable manner, and entices the owner out of possession.

Tho' he afterwards opens the door, being only latched, and enters. *H. P. C. 138.*

Or, afterwards excludes the owner, by shutting the door, without other force.

Or, if he takes the owner and imprisons him, and then sends his servant peaceably to make entry; this is false imprisonment, but not forcible entry.

Or, if after entry, he cuts corn, grass, &c.

Or, if the entry be forcible, but not with intent to do wrong there; as, if a man goes cross the land with force, or a great company, to church, or market.

So, if a man enters an house to apprehend a felon, &c.

Or, an officer with force enters to do execution.

Or, by warrant of law.

### (B) Forcible Detainer.

(B 1.) What shall be.

**F**orcible detainer is, when a man, who enters peaceably, afterwards detains his possession by force: as, if he threatens a corporeal damage to him who attempts to enter. *H. P. C. 139.*

If he repels him with violence.

Or, continues the door shut, when the justices demand entrance. *H. P. C. 139.*

If he brings more arms than his family usually has. *Ibid.*

Or, more persons than his usual family. *Ibid.*

Or, the justices find unusual arms or company there.

If he lodges arms or men at a neighbouring place. *H. P. C. 139.*

If at the end of his term, he keeps drums, guns, halberds, to oppose the entry of the lessor; tho' no one attempts an entry. *R. 2 Cro. 199.*

So, it shall be a forcible detainer, if a lessee at will detains with force, after the will is determined. *Vide Cromp. 70. b.*

Or, a mortgagor, after the mortgage is forfeited. *Vide Dalt. c. 126.*

Or, a feoffee of a disseisor, after entry or claim by the disseisee. *Vide Cromp. 69. b.*

So, if a lessee, with force, resists a distress for rent. *Vide Cromp. 69. b. 70.*

Or, forestalls, or rescues the distress. *Vide Cromp. 69. b.*

(B 2.) What not.

But it is not a forcible detainer, if a lessee at will, after the determination of the will, denies possession to the lessor, when he demands it. *Vide Cromp. 70. b.*

Or, shuts the door against the lessor when he would enter. *Vide Cromp. 70. b.*

So, it is not a forcible detainer, if he keeps out a commoner, by force, upon his own land. *Cro. Car. 486.*

So,

So, by the *§. 8 H. 6. 9.* any in possession three years, by himself, or any under whom he claims, may detain with force.

And by the *§. 31 El. 11.* no restitution shall be given on an indictment of forcible entry, or detainer, where the party hath been three years in quiet possession before the indictment found, and his estate not determined.

But if *A.* was in quiet possession three years, and then disseised by force, and restored; he cannot afterwards detain with force within three years after his restitution: for his possession was interrupted. *R. Dy. 141, 2.*

### (C) Remedy, by Action.

**A**N action lies upon *§. 15 R. 2. 2.* against him who makes a forcible entry.

So, upon *§. 8 H. 6. 9.* against him who makes a forcible entry, or detainer.

*Vide Pleader, (2 S 20.)*

### (D) Remedy by Justices of Peace.

#### (D 1.) Upon View.

**S**O, by the *§. 15 R. 2. 2.* a justice of peace may go to the place, &c. and if he find any hold forcibly, shall commit, &c. till, convicted by record of the justice, they make fine and ransom.

And therefore, any justice of the peace, upon view of the force, may make a record of it, and commit the offender. *Vide Dalt. c. 44.*

And this, without a writ directed to him to execute the statutes.

And upon any information, without a complaint of the party.

So, every justice may take the sheriff, and *posse comitatus*, to restrain the force. *Vide Dalt. c. 44.*

He may break open a house to remove the force. *Vide Dalt. c. 44.*

The record made by a justice upon view, shall be a conviction, and is not traversable. *Vide 8 Co. 121. Dalt. c. 44.*

And ought to be certified to *B. R.* or the next assizes, or quarter sessions. *Vide Dalt. c. 44.*

And the party convicted shall be there fined. *Ibid.*

But the justice himself cannot fine. *Dub. Dalt. c. 44. Vide Sal. 353.*

And, if a defect appears in the conviction, to *B. R.*, it shall be quashed. *1 Sid. 156.*

[If the conviction is in the preter-perfect tense, *accessimus & vidimus*, instead of the present tense, it shall be quashed. *Rex v. Landen, T. 7 G. Str. 443.*]

[The justices of peace must set the fine; and they must do it before they commit the offender, tho' they may take a reasonable time to consider of it. If no fine is set by the justices, and the offender is committed, *B. R.* cannot set the fine, but will quash the conviction. *Rex v. Elwell, M. 1 G. 2. Str. 794. Ld. Raym. 1514.*]

#### (D 2.) By Inquisition.

So, by the *§. H. 8. 6. 9.* a justice of peace, whether the persons be present or gone, shall inquire of such forcible entry, or detainer; and

and on such inquiry shall direct warrants to the sheriff, to summon indifferent persons near the lands, having 40*s. per ann.*, to inquire, &c.

And shall return 20*s.* the first day on each summoned, 40*s.* the next day, and 5*l.* the next, and so double; on pain of 20*l.*

And therefore, every justice of peace may make inquisition upon a forcible entry, or detainer.

(D 3.) By Indictment.

So, an indictment may be for a forcible entry or detainer, before justices of peace of the county where the land lies, at the quarter-sessions.

But an indictment for a forcible detainer ought to shew, that the entry was peaceable. *R. 2 Cro. 151. Vide post. (D 4.) cont.*

[One joint-tenant may be indicted for a forcible entry upon the other joint-tenant. *Rex v. Marrow, M. 9 G. 2. B. R. H. 174.*]

(D 4.) *What shall be a good one.*] The indictment ought to be certain; and therefore, it ought to shew the certainty of the house or land where the entry was: for, if it says, *in-unum tenementum*, it shall be quashed. *2 Rol. 46. Vide Indictment, (G 1, &c.)*

So, it ought to shew, what estate he had in the land where the entry was made: as, before the *st. 21 Jac.* it ought to shew that he had a freehold.

And since, it ought to say what estate he has: for, perhaps he is only tenant at will. *Semb. 1 Sal. 260. R. 1 Sid. 102.*

And tho' it afterwards says, *quod disseisivit*, it is not sufficient: for that is only an implication of a freehold. *R. 1 Vent. 306.*

So, *possessionatus pro termino* is not sufficient, without saying, for life, or for years. *1 Vent. 306.*

So, it ought to say, *adtunc existen.* his estate: for, at the time of the indictment is not sufficient. *R. 2 Cro. 214. 639.*

And *adtunc & adhuc existen.*, &c. will be repugnant. *Sho. 272.*

So, it ought to allege an express expulsion: for it is not sufficient to say, *quod intravit & eum disseisivit & expulsus extratenuit*; but it ought positively to say, *quod fuit disseisitus*. *R. 1 Sal. 260.*

An indictment for a forcible entry may be quashed upon motion, before a fine is set; not afterwards, without a writ of error. *Sal. 450.*

But an indictment for a forcible detainer shall be good, tho' it does not shew, whether the entry was by force, or peaceably: for certainty is only necessary in the point charged; and if it is not said, by force, it shall not be intended. *Dub. 2 Cro. 20. Vide ante, (D 3.) cont.*

So, an indictment for a forcible entry is good, tho' it says, *adhuc detinet*, without shewing, that it was *contra pacem*: for, perhaps the detainer was without force. *R. 2 Cro. 32.*

So, it is sufficient to say, *disseisivit*, without adding, *& expulit*. *Ibid.*

*Quod fuit possessionatus pro termino annorum*, without saying, how many years. *1 Vent. 306.*

(D 5.) When Restitution shall be made.

By the *st. 8 H. 6. 9.* a justice of peace, if on inquiry, &c. a forcible entry or detainer is found, shall put the party in possession of the lands so entred or holden.

And



And the justice shall make restitution, after inquisition found, to the party ousted, by himself, or by his precept to the sheriff. *Per two J. Ray. 85. Carth. 496.*

So, restitution shall be made upon an indictment at the quarter sessions. *H. P. C. 140.*

So, *B. R.* shall make it by a writ to the sheriff, if the indictment be removed into court by a *certiorari*, or certificate of the justice. *H. P. C. 140. Vide Dalt. c. 131.*

[If indictment is removed by *certiorari*, *B. R.* may award restitution, discretionally; and will do it, unless defendant plead very soon, and take notice of trial within term. *Rex v. Marrow, M. 9 G. 2. B. R. H. 174.*]

So, justices of gaol-delivery, upon an indictment before them. *Sav. 68.*

So, re-restitution shall be, where the indictment is quashed. *Sav. 68. 2 Cro. 151.*

[When the conviction is quashed, restitution must be awarded, tho' the party's title is expired since the conviction. *Rex v. Jones, M. 8 G. Str. 474.*]

So, restitution shall be to a disseisor ousted by the force of the disseisee. *Vide Dalt. c. 132.*

To a lessee, tho' the lessor, who was disseised, thereby opposes it. *Vide Dalt. c. 132.*

To a copyholder, tho' his lord opposes it. *Vide Dalt. c. 132. Cont. before the st. 21 Jac. 15. Dy. 142. a. in marg.*

(D 6.) *How made.*] A justice of peace, or sheriff, shall break open a house to make restitution.

(D 7.) When not.

But no writ of restitution shall be awarded, where the party has possession. *Marl. pl. 12.*

Nor, to an advowson, common rent, &c. for it shall only be to land. *Vide Dalt. c. 44.*

Nor, where he, who used force, has the possession by operation of law: as, if a disseisee enters, and afterwards, by force, ousts his disseisor; the possession shall not be restored: for it was revested in the disseisee by his entry. *Vide Dalt. c. 132.*

Nor, if a lessor enters by force upon the lessee, for a forfeiture. *Sal. 587.*

Nor, to any other than him who was ousted by force: as, to his heir. *Vide Dalt. c. 132.*

Or, any abator, after the death of the ancestor. *Vide Dalt. c. 132.*

Nor, if the party tenders a traverse to the inquisition. *1 Sid. 287.*

It shall be stayed, or granted at discretion. *H. P. C. 141.*

It shall be stayed. *Sal. 260. Vide Sal. 588. semb. that it shall be stayed.*

But it is said, that it shall be granted. *Mod. Ca. 115.*

So, upon a *certiorari* delivered to remove an indictment, it shall be stayed. *H. P. C. 141.*

Or, if the indictment appears insufficient. *H. P. C. 140.*

And in such case, restitution granted may be stayed before execution. *Ibid.*

So,

So, restitution shall not be, after a conviction by a justice upon his view. 1 *Vent.* 308.

Nor, by justices of assize, goal-delivery, or justices of peace; if the indictment was not found before them. *H. P. C.* 140. *Vide Dalt. c. 44.* 131.

So, restitution shall not be, unless immediately; nor four or five years afterwards. *R. Carth.* 496.

Nor, by *§. 31 El.* 11. if by plea it appears, that the party had possession for three years before the inquisition found. *R. Ray.* 85. *Sal.* 260.

Tho' the plea does not shew, how he was possessed. *R. Ray.* 85. 1 *Sid.* 149.

#### (D 8.) Suppression of Riots.

(D 8.) *What shall be a riot.*] A riot is, when three or more assemble, and do an unlawful act. *H. P. C.* 137. *Vide 3 Inst.* 176.

[If six persons are indicted, two of them die untried, two found not guilty, and two found guilty, it is good, for it shall be supposed it was committed with those who have not been tried, and judgment shall not be arrested. *Rex v. Scott, M. 2 G. 3.* 3 *B. M.* 1262.]

As, if they make a battery upon another. 3 *Inst.* 176.

Hunt in his park, chase, warren, &c. *Ibid.*

Enter upon his possession, or destroy his corn, herbs, goods, &c. *Ibid.*

So, if three or more assemble to do a lawful act in an unlawful manner: as, to abate a nuisance, and they do it with threats, and boisterous behaviour. *Vide Dalt. c. 137.*

To ride to market, &c. and they do it in harness, &c. *Vide Dalt. c. 138.*

If a man, upon menaces made to him, assembles a company to go with him for his defence. *Vide Dalt. c. 137.*

If he enters land to which he has title, with numbers, and in a forcible manner. *Vide Dalt. c. 138.*

If he rides *Skimmington* in a tumultuous manner. *R. 3 Keb.* 579.

If an assembly be upon an unlawful occasion, and he who comes upon a lawful cause, joins in an affray which happens, he may be a rioter. *Mod. Ca.* 43.

For where the assembly was unlawful, the act of one shall be imputed to all. *Per Holt, Sal.* 595.

So, if in a journey, the company beat a stranger riding on the road, it will be a riot in all who act: for when the quarrel began, it began to be an unlawful assembly. *R. Sal.* 595.

(D 9.) *What a rout.*] A rout (from the German word *rot*) is, when they assemble for an unlawful design, and move in it, but do not execute it. *Vide Dalt. c. 136.*

(D 10.) *What an unlawful assembly.*] An unlawful assembly is, when three or more assemble to do an unlawful act, but do nothing. *H. P. C.* 137.

(D 11.) *What not.*] But it will not be a riot, if three or more assemble

semble to do a lawful act, and they do it in a lawful manner; as, to remove a nuisance. *Vide Dalt. c. 137.*

Or, to defend a man in his house against violence. - *Ibid.*

So, if the servants of the owner of a house enter by force, by command of their master, when the servants of him, who has the custody of the house, oppose them. *R. Mo. 787.*

So, if they assemble to do an act which seems lawful; as, to remove timber to which they claim title. *Vide Dalt. c. 137.*

So, if divers, *clamore rioso*, prevent an election of officers in a borough; it is not a riot, if the right of election be not shewn: for to make a riot, there ought to be an unlawful act, and an unlawful assembly. *R. Sal. 594.*

If they break the door of the *Guildhall*, if it is not shewn whose house it was; for perhaps it belonged to the defendants. *R. Sal. 594.*

So, if divers assemble peaceably upon a lawful occasion, it will not be a riot tho' a sudden affray happens. *Mod. Ca. 43. R. Sal. 595.*

So, if a man, accompanied with his servants, does an outrage; it is not a riot in the servants, who did not intend mischief: for none shall be a rioter, except him who acts, when the assembly was not with a bad intent. *Sal. 595.*

Tho' he had more servants than he usually had. *Vide Dalt. c. 136.*

If a jury, or *posse comitatus*, quarrel among themselves. *Ibid.*

If travellers quarrel, and beat one of the company.

So, it is not a riot, if several assemble at an alehouse in friendship; tho' they ought not to do it. *Vide Dalt. c. 136.*

Or, for sport; as, for foot-ball, bull-baiting, bear-baiting, &c. *Ibid.*

Or, for dancing, bowls, cards, dice, &c. tho' they are not lawful games. *Vide Dalt. 136.*

So, if three are indicted for a riot, and one only found *not guilty*, all ought to be discharged. *R. Sal. 593.*

Tho' the others made a battery, they shall not be punished for it: for the offence charged was a riot. *Sal. 594.*

(D 12.) *How suppressed. By one justice of peace.*] By the *st. 34 Ed. 3. 1.* justices of peace shall have power to restrain all evil doers, rioters, &c. and to arrest, pursue, and punish them according to law. *Vide Justices of Peace, (B 9.)*

And therefore, if there be a riot, rout, or unlawful assembly, every justice of peace may require the offender to find sureties for the peace, or good behaviour, and commit him upon refusal. *Vide Dalt. c. 82.*

Or, may order another to arrest him. *Ibid.*

(D 13.) *By more justices.*] So, by the *st. 13 H. 4. 7.* if a riot be made, justices of peace, or two of them, with the sheriff, under-sheriff, and *posse*, if not one, shall arrest them, and record what they find done in their presence; by which they shall be convicted, as in forcible entry. *Vide Justices of Peace, (B 9.)*

Any two justices in the county may make the conviction, tho' the two next justices only are bound to do it. *Vide Dalt. c. 82.*

(D 14.)



(D 14.) *When upon view.*] The justices of peace, for execution of the *st. 13 H. 4. 7.* ought to go to the place where the riot is made, with the sheriff, &c. for the sheriff ought to join throughout the whole proceeding. *R. Ray. 386.*

And the justices, with the sheriff, may arrest all present, and take their arms. *Vide Dalt. c. 82.*

Tho' they came without intent to do mischief. *Ibid.*

And all riotously arrayed, whom they see in their way to the place, or back again. *Ibid.*

And may make fresh suit after any who escape. *Ibid.*

Or, send a warrant for them to find surety, &c. *Ibid.*

So, the justices, with the sheriff, ought to make a record of every thing unlawful done in their presence. *Kel. 41. a.*

And fine and imprison the offenders. *Vide Dalt. c. 82.*

And the sheriff ought to be a party to the record, if the conviction be before the rioters disperse. *R. Sal. 593.*

And ought to join in setting the fine upon the offender. *R. Ray. 386.*

The record ought to shew all the circumstances of the fact in certain.

It ought to shew the conviction to be upon view. *R. Ray. 386.*

It ought to make the conviction in the present, not the perfect tense. *2 Mod. Ca. 65.*

The fine shall be upon each offender severally. *Vide Dalt. c. 82.*

And commitment shall be immediately upon conviction. *Kel. 41. a.*

After the record made upon view, it shall be certified to *B. R.* assises, or sessions. *Vide Dalt. c. 82.*

And is not traversable. *Vide Dalt. c. 82.*

But justices of peace cannot deliver possession; for they can do nothing but punish and record the force. *R. 1 Sid. 156.*

And if they do, *B. R.* will make restitution. *1 Sid. 156.*

So, if justices of peace proceed wrongfully, an information will go against them. *Ibid.*

And their conviction, if it appears to be bad, may be quashed upon motion, without a writ of error. *Ibid.*

(D 15.) *By inquisition.*] By the *st. 13 H. 4. 7.* if a riot be, &c. and the offenders be departed before the justices come, they shall inquire of such riot within a month, and hear and determine it.

And the justices may inquire without the sheriff, where the rioters are dispersed. *R. Sal. 593.*

So, they may inquire after the month: for they are only subject to a penalty, if they do it not in that time. *Ibid.*

An inquisition is sufficient, if it says, *pro domino rege*, without saying *pro domino rege, & corpore comitatus*, as an inquisition taken by a grand inquest. *R. Sal. 593.*

*Vide more of this, in Justices of Peace, (B 10.)*

(D 16.) *By surety of the peace. How granted. Upon a supplicavit.*] So, a riot, or breach of the peace, may be restrained, or prevented by sureties found for the peace.

If it appears to the *Chancery*, upon complaint, that any one has cause

cause to pray sureties for the peace against another, a *supplicavit* shall be directed to any justice of peace, or to the justices in general, or to the justices and sheriff, to take of him such sureties, or commit him to prison. *F. N. B.* 80. *Reg.* 88. *Vide Chancery* (4 R).

So, a *supplicavit* lies from *B. R.* 1 *Keb.* 203. 290. *Mo.* 43.

And the sheriff may break open a house upon a *capias* to find sureties for good behaviour. *R. Mo.* 606.

If articles are sworn in *Chancery*, upon which a *supplicavit* is granted, and by *habeas corpus* the party being brought to a judge of *B. R.* is bound to appear in *B. R.* If the articles are transmitted from the *Chancery* to *B. R.*, or the witnesses appear, and charge him there; he shall be bound in *B. R.*, otherwise not. *Skin.* 61.

A *supplicavit* shall not be granted, but upon *affidavit*, that it is not prayed of malice. *F. N. B.* 79. *H.*

And if it be for good behaviour also; articles ought to be exhibited. *R.* 2 *Keb.* 305. 1 *Sid.* 67. 1 *Lev.* 53.

[Articles of the peace cannot be exhibited, without oath, by a quaker. *Rex v. Green*, *T.* 8 *G. Str.* 527.]

It may be granted upon menace of corporal damage. *Reg.* 88. *F. N. B.* 79. *G.*

Or, menace of burning his house. *Ibid.*

For going or riding armed. 1 *Keb.* 203.

Disturbance of divine service, and carrying the minister to prison. *R.* 1 *Keb.* 290.

For dread of damage to him and his men, by such as have discord with him. *Reg.* 89. *a.*

[*B. R.* will reject articles of the peace, if the parties live far off in the country, and direct the exhibitant to apply to a justice in the neighbourhood. *Rex v. Waite*, *P.* 32 *G. 2.* 2 *B. M.* 780.]

[Or, they may receive them, and issue attachment of the peace, with an indorsement authorising any justice in the county where defendant resides, to take security, &c. and specifying the sums. *Rex v. Bowmaster*, *T.* 33 & 34 *G. 2.* 2 *B. M.* 1039.]

[If after articles have been exhibited it appear manifestly to be a perjury, the court will stay process against the defendant, commit the complainant, and order prosecution for perjury. *Rex v. Parnell*, *T.* 32 & 33 *G. 2.* 2 *B. M.* 806.]

(D 17.) *How it shall be executed.*] The justice executes a *supplicavit* as minister: and therefore ought to pursue his writ strictly.

And the justices themselves to whom it is directed, or one of them, ought to execute it: for he cannot depute another. 2 *Rol.* 348.

Or, the party, or his friends for him, shall give surety in *Chancery*, and have a *superfedeas* to the *supplicavit*. *F. N. B.* 81. *A.*

Or, in *B. R.* when the *supplicavit* goes from thence. *R. Mo.* 43.

So, upon a certificate of the justices to whom directed, that the party who demands it is contentious, and the other of good fame, a *superfedeas* is usually granted.

After surety taken by recognizance for the peace, the justices ought to return the writ and recognizance. *Lamb.* 110. *Vide Dalt. c.* 122.

If surety be given only for one of those against whom a *supplicavit* is granted; it ought to be returned, that the other *non est inventus*. 2 *Rol.* 348.

Or,

Of, that he who demands it released to him. *Lamb. 111.*

If the justice does not return the writ or recognizance, a *certiorari* lies for them. *F. N. B. 81. B.*

Tho' the writ was not returnable in *Chancery*. *F. N. B. 81.*

(D 18.) *Upon a warrant of a justice of peace: How it shall be made.* So, a justice of peace, by warrant, may bring any before him, upon good cause, to find surety for the peace. *Vide Dalt. c. 118.*

[If a person arrested in execution rescues himself by force, a justice may grant a warrant against him for breach of the peace. *Curtis's Case, 1756, Foster, 135.*]

Or, may demand surety of any present, by *parol*. *Vide Dalt. c. 118.*

Or, command another, by *parol*, to arrest him being present, to find surety. *Ibid.*

A warrant by a justice of peace, to bring any before him to find surety for the peace, may be directed to the sheriff, to a constable, or other officer, or to a stranger. *Ibid.*

It ought to be under his hand and seal, and to contain the cause. *Vide Imprisonment, (H 6, &c.) Vide Dalt. c. 118.*

[The legality of a justice's warrant does not depend on the truth of the information whereon it is grounded. *Curtis's Case, 1756, Foster, 135.*]

But a justice of peace cannot enjoin another, that he shall keep the peace, under a penalty.

(D 19.) *How executed.*] If a warrant be directed to the sheriff, he may by *parol*, or precept, command any known officer to execute it. *Vide Dalt. c. 169.*

So, by precept, he may command any, who is not a known officer. *Ibid.*

But if it be directed to a constable, or a stranger, he ought to execute it himself; for he cannot make a deputy. *Ibid.*

If it be directed to two or more, either of them may execute it. *Ibid.*

The officer ought to require him to find surety, before he arrests him. *Vide Execution, (C 12.) Vide Dalt. c. 118.*

He ought to inform him at whose suit, and for what, it is demanded. *R. 6 Co. 54. a.*

And if he be not an officer known and sworn, he ought to shew his warrant. *Vide Dalt. c. 169.*

Otherwise, if he be an officer known and sworn. *Ibid.*

The officer, for executing his warrant, may take the *posse comitatus*. *Vide Dalt. c. 172.*

And break open a house if necessary. *Vide Dalt. c. 127. 169.*

And justify a battery of the person, if he resists.

[Peace-officers having a legal warrant to arrest for breach of the peace, felony, or dangerous wound, may break open the party's own doors, after having demanded admittance, and given *due notice* of the warrant. *Curtis's Case, 1736, Foster, 135. 320.*]

[It is not necessary, in order to its being *due notice*, that the officer should say what sort of warrant it is. *Ibid. Per ten Judges against two.*]



[If after this the officer is resisted, and he or any of his assistants killed, it is murder. *Curtis's Case*, 1736, *Foster*, 135. 620.]

If a person be taken upon the warrant, the officer may commit him, without other warrant, if he refuses to come before a justice, or to find surety there. *R. 5 Co. 59. b.*

So, the justice may commit him, if he does not find, or does not offer surety. *Vide Dalt. c. 171.*

And where the warrant is general, the officer may bring him to what justice he pleases. *Vide Dalt. c. 169. 5 Co. 59. b.*

(D 20.) *A recognizance for the peace. How taken.*] Tho' no statute directs that surety shall be taken for the peace, yet a recognizance seems the most congruous means for it; for none shall be bound to the king but by record; and by the *st. 33 H. 8. 39.* all obligations to the king shall be in his name, *solvend. domino regi.* *F. N. B. 82.*

And therefore, justices usually take surety by recognizance for keeping the peace till the next sessions, against the king and all his people, and especially against him who demands it.

[If *A.* exhibits articles against *B.*, styling herself his wife, pending a suit concerning the marriage, the recognizance shall be, to keep the peace to, &c. particularly *A.*, who has exhibited articles by the name of *A.* wife of said *B.* *Rex v. Bambridge*, *T. 18 G. 2. Str. 1231.*]

And by the *st. 3 H. 7. 1.* the justice ought to certify the recognizance at the next sessions; that if the party make default, it may be recorded, and certified, with the recognizance, into *Chancery*, *B. R.*, or *Exchequer*.

And therefore the next sessions is the proper place for the appearance of the party; tho' the recognizance does not mention before what justices, or in what court, or at what time, he ought to appear. *Vide Dalt. c. 119.*

So, the recognizance may be for life, or for years, upon good cause. *Vide Dalt. c. 119.*

And if no time is mentioned, it shall be intended for life. *Vide Dalt. c. 119. 21 Ed. 4. 40. b.*

But the time and sum in which he is to be bound, and the number and sufficiency of the sureties, are in the discretion of the justices. *Vide Dalt. c. 119.*

So, a recognizance to keep the peace, generally, is good, without saying against *A.* in particular; or, to keep it against *A.* without saying, against all in general. *Vide Dalt. c. 119.*

So, a recognizance to be levied of goods only, or of lands only, is good; for *only*, shall be rejected, and the recognizance shall be general. *Vide Dalt. c. 119.*

If the sureties prove insufficient, he shall be compelled to find new sureties by recognizance. *Vide Dalt. c. 119.*

So, if the recognizance be forfeited. *Vide Dalt. c. 115.*

Otherwise, if a surety dies; for his executor shall be charged. *21 Ed. 4. 40. b. Vide Dalt. c. 119.*

So, a justice of peace may take money in deposit for surety of the peace. *Per Berkly, Cro. Car. 446. Vide Dalt. c. 119.*

But a recognizance, which does not mention the preservation of the peace, will be void. *Vide Dalt. c. 119.*

Tho'

Tho' it be, that he do not assault, maim, &c. for there are other breaches of the peace. *Vide Dalt. c. 119.*

(D 21.) *Of whom surety of the peace may be demanded.*] Surety of the peace may be demanded against every one under the degree of a peer. *Vide Dalt. c. 117.*

[It may be demanded against a peer, and he shall enter into a recognizance, with bail. *Rex v. Marquis of Carmarthen. Fort. 359.*]

[Against a peer, by his wife. *Rex v. Earl Stamford, T. 9 G. B. R. H. 74. Rex v. Earl Ferrers, T. 31 G. 2. 1 B. M. 631.*]

[The wife in court is not obliged to answer her husband or his counsel any questions before she exhibits the articles; and if any threats are dropt, the court will not suffer her to answer them. *Ibid.*]

Tho' he be an ecclesiastical person. *Vide Dalt. c. 117.*

A sheriff, coroner, or other officer of justice. *Vide Dalt. c. 117.*

Tho' a justice of peace in the same commission. *Vide Crompt. 122. Dalt. c. 117.*

Tho' it be a person attainted, or excommunicated. *Vide Dalt. c. 115.*

A feme-covert, or infant within the age of discretion; for the sureties shall be bound for them. *Vide Dalt. c. 117.*

(D 22.) *And by whom.*] So, a feme-covert may demand it against her own husband. *Reg. 89. F. N. B. 80. F. 3 Keb. 433. 2 Lev. 128. [Rex v. Brotherton, M. 8 G. 2. B. R. H. 74.]*

[By a wife against her husband, a peer. *Rex v. Earl Stamford, T. 9 G. ibid.*]

Or, a husband against his wife. *Vide Dalt. c. 117. [Sim's Case, P. 17 G. 2. Str. 1027.]*

So, a person attainted, excommunicated, or abjured. *Vide Dalt. c. 117.*

Attainted in *præmunire*. *Vide Dalt. c. 117.*

A villein against his lord, & *à contra*. *Vide Dalt. c. 117.*

A denizen, or alien amy. *Vide Dalt. c. 117.*

But not by an alien enemy. *Vide Dalt. c. 117.*

Or, a *non compos*; tho' care shall be taken for his safety. *Vide Dalt. c. 117.*

(D 23.) *Of whom not.*] But surety of the peace shall not be demanded against a peer. *Vide Dalt. c. 117. [But see (D 21.) contra.]*

Nor, against one *non compos*, tho' care shall be taken to prevent his mischief. *Vide Dalt. c. 117.*

Nor, against an alien enemy. *Vide Dalt. c. 117.*

(D 24.) *What cause for it.*] A justice of peace may demand surety, if any in his presence assaults, or threatens corporal damage to another. *Reg. 88. B. F. N. B. 80.*

Or, threatens to burn his house. *Reg. 88, 9.*

If he assaults the justice himself; tho' it is more proper that another do it. *Vide Dalt. c. 116.*

If he comes with force into the presence of the justice in the exercise of his office, or goes or rides in arms (not being a servant to the

king, in execution of process, aid of an officer, or upon hue and cry) to the affray of the people, against the *ft.* of *Northampton*: 2 *Ed.* 3. 7 *R.* 2. 13. 12 *R.* 2. 6. or 20 *R.* 2. 1. *Vide Dalt. c. 9.*

If he makes a duel, or sends a challenge.

Makes a riot, rout, or unlawful assembly. *Vide Dalt. c. 116.*

If he quarrels in the presence of the justice. *Vide Dalt. c. 116.*

Gives the lie to another in *Westminster-Hall sedente curiâ.* 1 *Lev.*

107.

If he makes an affray, or terrifies the people. *Vide Dalt. c. 116.*

If he be brought before him by a constable for breaking the peace. *Vide Dalt. c. 116.*

Or, upon oath by another of corporal mischief done, or menace of it, or of burning his house, and that he is in fear of it. 2 *Lev.* 228.

Or, that he threatened it to his wife, or children. *Vide Dalt. c. 116.*

And if the wife makes such oath, tho' there are other affidavits to the contrary. 2 *Lev.* 128.

[The court will give credit to the oath of the party exhibiting articles, and not go into any inquiry as to the truth of them; but they will review the articles, to see if the facts stated require security. *Lord Vane's Case, H. 17 G. 2. Str.* 1202.]

So, if a justice suspects him inclined to break the peace. *Vide Dalt. c. 116.*

If he be a common barretor. *Vide Dalt. c. 116.*

[It may be demanded, tho' the fact on which the prosecutor grounds his fear is pardoned. *Rex v. Mendez, M. 8 G. Str.* 473.]

But it is not a cause that he threatens imprisonment to another, or to burn his goods; for he may have another remedy by action. *Vide Dalt. c. 116.*

That he has made a battery, or a variance. *Vide Dalt. c. 116.*

Or, that he is in fear of damage to his servants, or cattle. *Vide Dalt. c. 116.*

(D 25.) *What, for good behaviour.*] By the *ft.* 34 *Ed.* 3. 1. justices of peace may take of all not of good fame sufficient surety for their good abearing towards the king and his people.

And it may be granted by justices of peace, by recognizance, or upon a *supplicavit*, as surety for the peace. *Vide Dalt. c. 123.*

And for every cause for which surety of the peace is demandable.

And against any of bad fame, if he does that which tends to the breach of the peace.

As, if he be a common barretor. *Vide Dalt. c. 124.*

If he lies in wait to rob, or puts passengers in fear. *Vide Dalt. c. 124.*

Going with unusual arms to the terror of others. *R. 1 Keb.* 203.

If they are suspected for robbers, or manslaughterers. *Vide Dalt. c. 124.*

Nightwalkers, pilferers, or messengers of thieves; for these are presentable in the leet. *Vide Dalt. c. 124.*

Dangerous rogues, or vagabonds.

If they practise in poison for others, their cattle, or fowls. *Vide Dalt. c. 124.*

If they throw down gates, or do outrage in the night. *Vide Dalt. c. 124.*

Eves-



Eves-droppers by night, or by day. *Vide Dalt. c. 124.*

Idle persons, who destroy pigeons by engines, or the game, or do trespasses in parks, or warrens. *Vide Dalt. c. 124.*

If they suborn witnesses. *Mar. 11.*

Maintain, or resort to bawdy-houses. *13 H. 7. 10.*

If they frequent taverns or alehouses, not having means of livelihood. *Vide Dalt. c. 124.*

Suspected for the father of a bastard. *Lamb. 122.*

Libellers. *Vide Dalt. c. 124.*

[Whether a person taken up by secretary's warrant for a libel shall give security for good behaviour, or only for appearance, seems unsettled. *Res v. Shuckburgh, M. 17 G. 2. Wilf. 29.*]

Common cheats, or cozeners. *Vide Dalt. c. 124.*

If he abuses a justice of peace in the execution of his office, or his warrant, or refuses to obey him. *Vide Dalt. c. 124.*

Or, gives contemptuous words to a magistrate. *11 Co. 98.*

Or, provoking words; as, *You lie, &c.* in *Westminster-Hall. 1 Lev. 107.*

(D 26.) *What shall be a forfeiture of a recognizance for the peace.* A recognizance for the peace shall be forfeited by any breach of the peace. *Vide Dalt. c. 121.*

As, if he does any act to the prejudice of the person of another; as, murder, or any homicide. *Vide Dalt. c. 121.*

High treason against the person of the king. *Vide Dalt. c. 121.*

Burglary, or robbery; for these relate to the person. *Vide Dalt. c. 121.*

Rape, or any unlawful battery, or assault. *Vide Dalt. c. 121.*

Imprisonment of another. *Vide Dalt. c. 121.*

Throwing into the water, or any other misuse. *Vide Dalt. c. 121.*

Threatening of another, in his presence, to beat him. *2 Rol. 199.*

Or, in his absence, if he afterwards lies in wait for him. *Vide Dalt. c. 121.*

If he be concerned in a riot, rout, &c. *Cro. El. 86. Vide Dalt. c. 121.*

If he rides, or goes in arms, or with unusual arms or attendants, in affray of the country. *Vide Dalt. c. 121.*

So, if he gives a challenge. *4 Inst. 181.*

Or, commands, or procures, a breach of the peace, if it be afterwards broken. *4 Inst. 180. Vide Dalt. c. 121.*

If he procures another to break the peace. *2 Rol. 199. Vide Dalt. c. 121.*

But a justifiable assault, or battery, is not a breach of a recognizance for the peace; as, by correction of his wife, son, servant, apprentice, scholar, prisoner, lunatic, &c. *3 Keb. 433. Vide Dalt. c. 121.*

Or, in defence of himself, his wife, son, father, master, servant, or goods, &c. *Vide Dalt. c. 121.*

By the act of a constable, or other officer, in the execution of justice. *Vide Dalt. c. 121.*

In the exercise of lawful sports. *Vide Dalt. c. 121.*

So, no act, which does not concern the person of another, tho' the indictment

indictment for it be *contra pacem* : as, larceny, or other felony of the same nature. *Vide Dalt. c. 121.*

A wrongful taking of the goods of another, a *disseisin*, or trespass upon his land. *4 Inst. 181.*

So, scolding words ; for an act must be done. *4 Inst. 180.*

(D 27.) *Of a recognizance for good behaviour.*] So, a recognizance for good behaviour shall be forfeited by any act which amounts to a breach of the peace, or requires surety for good behaviour. *Vide Dalt. c. 123.*

An escape from a constable, being arrested for a suspicion of a crime, tho' not guilty. *R. Godb. 22. Vide 2 Leo. 166.*

If he puts the people in terror. *2 Rol. 199. Semb. 2 H. 7. 2. b.*

So, words, which tend to the public prejudice, or which may make a breach of the peace. *2 Rol. 200.*

But it will not be a breach of recognizance for good behaviour, that he enters into the house or land of another, or takes the goods of another. *2 Rol. 199.*

Or, if he calls a person, who is guilty of felony, a *felon*. *2 Rol. 200.*

Or, calls another *knave*, or uses other words of passion to another not in office. *2 Rol. 228.*

*Vide more, concerning forfeiture of a recognizance for good behaviour, in Justices of Peace, (B 8.)*

(D 28.) *How superseded.*] If any person gives surety of the peace in *Chancery* or *B. R.*, there shall be a *superfedeas* to the justices of peace to take it. *F. N. B. 238. E.*

So, if he gives it before one justice, he may have from him a *superfedeas* requiring another justice not to take it for the same cause.

After a *superfedeas* from the *Chancery* or *B. R.*, if a justice proceeds, an attachment goes against him.

And if the party be arrested, it will be false imprisonment.

Tho' the *superfedeas* does not mention the names of the sureties, or the sum in which bound.

(D 29.) *How discharged.*]—[It may be discharged on motion, on producing prosecutor's consent verified by affidavit. *Rex v. England, M. 9 G. 2. B. R. H. 158.*]

[Or, consenting by counsel. *Rex v. Earl Ferrers, M. 32 G. 2. 1 B. M. 703.*]

If security be given upon a *supplicavit*, and no prosecution within a year and a day, the security shall be discharged. *F. g. 268.*]

[If one is bound to keep the peace for a twelvemonth, and appear the first day of term, at which day the time is out, and does then appear ; he must be discharged, if no indictment is lodged. *Rex v. Benn, P. 8 G. 2. B. R. H. 98.*]

So, if the party be committed, after a year he shall be discharged upon slight security. *F. g. 268.*

[If a husband has acted only for the recovery of his wife's senses, and that by physicians' directions, his recognizance shall be discharged. *Rex v. McKenzie, T. 6 G. 3. 3 B. M. 1922.*]

How

## FORCIBLE ENTRY.

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How a recognizance for the peace may be discharged by release, or death, *vide* in *Justices of Peace*, (B 6, 7.)

## FORCES.

*Vide Prerogative*, (C 3.)

## FORCIBLE MARRIAGE.

*Vide Justices*, (S 3.)

## FORECLOSURE.

*Vide Chancery*, (4 A 11.)

## FOREIGN ATTACHMENT.

*Vide Attachment*.—*London*, (N 1.)—*Pleader*, (2 G 5.)

## FOREIGN COUNTY.

*Vide Action*, (N 1, &c.)—*Justices*, (Y 14.)—*Pleader*, (S 11.)

## FOREIGN NATIONS.

*Vide Prerogative*, (B 1, &c.)

## FOREIGN OPPOSER.

*Vide Courts*, (D 15.)

## FOREIGN VOUCHER.

*Vide Courts*, (O 2.)—*Voucher* (D 3.—H).

## F O R E S T.

*Vide Chace*, *per totum*.

## FORE-STALLING.

*Vide Justices of Peace*, (B 38.)

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## FORFEITURE.

(A) Forfeiture, by Alienation, &c.

(A 1.) By Alienation of a particular Tenant.

(A 1.) *What* IF tenant for life or years conveys a greater estate than *shall be.* ] he can lawfully do, whereby the reversion, or remainder, is divested, it will be a forfeiture of his estate; as, if he makes a feoffment. *Co. L. 251. In pais. Vide Copyhold*, (M 2, &c.)



If he conveys to another in tail, or for his own life, and livery be made. *Co. L. 252. a. 1 Rol. 854. l. 7.*

Or, to another for his life, if he himself so long lives; for the other has an estate for his life, tho' determinable upon the death of the first lessee. *1 Rol. 854. l. 43. Lane, 38.*

If tenant *pur auter vie*, by statute-merchant, staple, or *elegit*, makes a feoffment, &c. it will be a forfeiture. *Co. L. 252. a.*

So, if tenant after possibility, by curtesy or in dower, &c. makes a feoffment, &c. *Co. L. 252. a. 1 Rol. 851. l. 35.*

So, if tenant for life or for years, and the remainder-man for life, join in a feoffment, &c. it will be a forfeiture of both estates. *Co. L. 251. b. R. 1 Leo. 262. 1 Rol. 855. l. 15. 2 And. 66. Dy. 339. a. R. 1 And. 45. 6.*

So, if he in remainder for life enters upon tenant for life, or years, and makes a feoffment, it will be a forfeiture of his remainder. *Co. L. 251. b.*

So, if there be joint-tenants for life, and one of them aliens in fee, it will be a forfeiture of his estate.

So, if husband and wife are joint-tenants, and the husband alone aliens in fee, it will be a forfeiture for the life of the husband. *29 Aff. 43.*

So, if husband and wife, seised in right of the wife for life, make a feoffment to *B.* to the use of him and his heirs for the life of the wife *tantum*; for by the feoffment a fee passed, tho' the use be declared only for the life of the wife. *R. 1 Leo. 126.*

So, if tenant for life, or years, remainder or reversion to the king, makes a feoffment, &c. it will be a forfeiture; tho' the remainder or reversion in the king is not divested. *Co. L. 251. b.*

So, if tenant for life, remainder to *B.* in tail, remainder to himself in fee, makes a feoffment, it will be a forfeiture. *1 Rol. 851. l. 30. 854. l. 52.*

So, if husband and wife, joint-tenants for life, or seised in right of the wife, make a feoffment, or the husband alone makes it, it will be a forfeiture during the coverture. *Vide Baron and Feme, (I 1.)*

So, if tenant for life, remainder in tail, remainder in fee, enfeoffs him in remainder in fee, it will be a forfeiture in respect of the *mesne* remainder. *R. 1 Co. 140. a.*

So, if he joins with him in the immediate remainder in tail, in a feoffment, and not by fine. *1 Sid. 83.*

So, if tenant for life enfeoffs a woman in the immediate remainder and her husband, it will be a forfeiture. *Bro. Forf. 21. 1 Rol. 855. l. 10.*

Or, him in the immediate remainder and his wife; for the whole estate passes from the tenant for life, and therefore it is not warranted, tho' he in reversion cannot enter during the estate of the husband. *Cont. 41 Ed. 3. 21. a. Acc. Bro. Entry cong. 8. 82. 1 Co. 76. b.*

(A 2.) *By alienation by matter of record.*] So, if tenant for life, or for years, levies a fine, it will be a forfeiture. *Co. L. 251. b.*

So, by the *st. 32 H. 8. 31. [Vide 14 El. c. 8.]* if he suffers a common recovery.

Tho' he comes in as vouchee. *R. 1 Co. 14. 2 Leo. 61.*

Tho' the recovery or fine be afterwards reversed by error. *R. 1 Sid. 90.*

Tho'

Tho' he was disseised before the fine levied, whereby, to some intents, *partes finis nihil habuerunt*. Co. L. 252. a. Dub. 4 Leo. 217. R. Mo. 424. Cro. El. 451. Cont. 1 And. 38.

So, if tenant for life, remainder for life, levies a fine to him in remainder for life, *sur consuſance come ceo*, &c. it will be a forfeiture. R. 2 Lev. 202. 2 Jon. 65. R. 2 And. 66.

So, if tenant for life, remainder to B. in tail, remainder to C. in tail, &c. levies a fine, or makes a feoffment to B. and his wife, and B. dies without issue, and the wife enters; it will be a forfeiture to C. R. 1 Rol. 855. l. 10.

So, if tenant for life joins with B., to whom a remainder in tail was limited, when his remainder is gone by the feoffment of his father with warranty. R. 1 Rol. 856. l. 15. Cro. Car. 392.

So, if there be tenant for life, remainder for life, and he in remainder for life levies a fine; it will be a forfeiture of his estate, tho' the reversion, or remainder, be not divested. R. 1 Leo. 40. Dub. Sti. 192, 3.

So, tho' the remainder was to A. in tail, and afterwards in fee to him, who had the remainder for life, and levied the fine. R. 1 Rol. 855. l. 20.

So, if there be a lease for years, remainder to A. for life, remainder to B. in tail, remainder to C. for life, &c. and A. and C. levy a fine *sur concessit* for their lives, it will be a forfeiture; for they grant a greater estate than they can lawfully make. Semb. 2 Jon. 70.

So, if tenant for life or years of an advowson, &c. or other thing which lies in grant, levies a fine, it will be a forfeiture; tho' the reversion is not divested thereby. Co. L. 251. b. 1 Rol. 852. l. 40.

[So, if the lessee covenant *not to underlet*, without consent of the lessor under hand and seal, with a power of re-entry in case of a breach, if, notwithstanding this covenant, the lessee *underlet* without consent, according to the terms of the covenant, this is a forfeiture. Cowp. 803.]

[But acceptance of rent due after the condition broken with full notice, is a waiver of the forfeiture. *Ibid.*]

[The acceptance of rent is no waiver of the forfeiture, unless the forfeiture was known to the lessor at the time. *Gregson v. Harrison*, B. R. E. 28 Geo. 3. 2 T. R. 425.]

[If a lease contain a proviso, that the lessee, his executors, &c. shall not *set, let, or assign over*, the whole, or part of the premises, without leave in writing, on pain of forfeiting the lease; the administrator of the lessee cannot underlet without incurring a forfeiture, tho' for less time than the whole term: and a parol licence to let part of the premises, does not discharge the lessee from the restriction of such a proviso. 2 T. R. 425.]

[Covenant not to assign, transfer, set over, or otherwise do or put away the lease or premises, does not extend to an under-lease for part of the term; and such under-lease is no forfeiture. *Crusoe v. Bugby*, C. P. T. 11 Geo. 3. 2 Bl. 766. 3 Wilf. 234. S. C.]

[A lessee, who had covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c. with a proviso, that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; and this was holden to be no forfeiture

forfeiture of the lease. *Mitchinson v. Carter*, B. R. M. 39 Geo. 3. 8 T. R. 57.]

[*Aliter*, where the warrant of attorney was given for the express purpose of enabling the creditor to take the lease in execution. *Mitchinson v. Carter*, B. R. T. 39 Geo. 3. 8 T. R. 300.]

(A 3.) *What alienation will not be a forfeiture.*] But, generally, an alienation by a particular tenant is no forfeiture, if the reversion, or remainder, is not thereby divested; and therefore, if tenant for life or years of an advowson, rent, common, or other thing which lies in grant, by deed grants his estate to another in fee, it is no forfeiture. Co. L. 251. b. 1 Rol. 854. l. 9. 12.

So, if a man in remainder, or reversion, for life, of lands, &c. grants his estate by deed to another in fee, it is no forfeiture. Co. L. 251. b. 1 Rol. 854. l. 11.

So, if a *cestuy que use* for life, before the *ft.* 27 H. 8. 10. had made a feoffment, it was no forfeiture. Mo. 38, 39.

So, if tenant for life bargains and sells to another in fee, it is no forfeiture. 2 Leo. 60.

Or, makes a lease and release to another in fee. 3 Mo. 151.

So, if tenant for life, or for years, makes a lease for 1000 years. 2 Leo. 60.

Tho' he afterwards levies a fine to corroborate the lease; for nothing passes but for his life. Dub. 2 Jon. 99.

So, if tenant for life leases for years to A. who makes a feoffment, and tenant for life releases to the feoffee; it is not a forfeiture of the estate for life. 1 Rol. 855. l. 5.

So, if tenant for life, or years, joins with him in reversion, or remainder in fee, in a feoffment, or fine, or recovery, it is no forfeiture; for each gives that which he lawfully may. R. 6 Co. 15. a.

And therefore, if a fine or recovery be reversed for infancy, &c. of him in reversion or remainder, the donee shall hold during the life of tenant for life. R. 1 Co. 76. b. 2 Leo. 108.

So, if tenant for life joins with him in the immediate remainder in tail, in a fine, it is no forfeiture; for each gives that which he lawfully may, and it will be a conveyance of the tail, and afterwards of the estate for life. [Vide 1 Vent. 160.] R. 1 Co. 76. Hob. 277. R. 1 Sid. 83. R. 2 And. 66.

[So, if A. be tenant for years, remainder to B. for life, remainder to the first and other sons of B. in tail; and A. and B. join in a lease and release to make a tenant to the *præcipe*, and suffer a recovery; the estate-tail limited to the sons of B. is not divested by the recovery, nor is there any forfeiture of the respective estates of A. and B. 1 T. R. 738.]

So, if an estate be limited to the husband for life, to the wife for life, remainder to the heirs of their bodies, and husband and wife join in a fine. R. Ray. 36. 1 Sid. 83.

Or, to A. for life, remainder to a woman; and A. and the woman intermarry, and join in a fine. R. Cro. El. 828.

So, if an estate be to the wife in tail, remainder to the husband *pur auter vie*, and they join in a fine; it is no forfeiture of the remainder for life, if the wife dies without issue. 1 Rol. 854. l. 47.

So, if an estate be to A. for life, remainder to B. in tail, who join in



in a fine, and *B.* dies without issue; the conusee shall hold for the life of *A.* *R. 1 Vent. 160.*

So, if a lessor disseises *A.* his lessee for life, and afterwards leases to *B.* for life; if *B.* leases to *A.* for life, it is no forfeiture; for *A.* is remitted, and thereby the livery made by *B.* avoided, and *B.* has the reversion for life. *1 Rol. 854. l. 22.*

So, if tenant for life makes a feoffment, or levies a fine, and limits the use only for his own life, it will not be a forfeiture.

So, if a husband, seised in right of his wife for life, levies a fine, &c. to the use of his wife during her life. *R. 1 Rol. 854. l. 35.*

So, if a lessee for life levies a fine to *A.* for the life of himself, to the use of *A.* for his life, it is no forfeiture; for the limitation is but for his own life, tho' the use is declared to *A.* for his life. *1 Rol. 854. l. 40.*

(A 4.) By a Claim of the Fee.

So, if a particular tenant claims the fee, it will be a forfeiture; as, if he joins the *mise*, in a writ of right against him, upon the mere right; for tenant in fee only can do it. *Co. L. 251. b. 9 H. 5. 14. a. 1 Co. 16. a.*

So, if tenant for years brings an assise, *ut de libero tenemento.* *Co. L. 251. b.*

Or, in debt for rent against him, claims a fee by bargain and sale of his lessor. *R. 3 Leo. 169. Mo. 212.*

Tho' the bargain and sale be traversed. *R. 3 Leo. 169.*

If a recovery be against tenant for years, in a *præcipe quod reddat*, and he brings error, for error in process. *Co. L. 251. b.*

So, if a lessee for life, or years, claims the fee in a *quid juris clamat.* *1 Rol. 853. l. 11.*

Tho' he has colour or pretence to do it. *1 Rol. 853. l. 12.*

(A 5.) Or, by an Affirmance of the Fee in a Stranger.

So, if tenant for life, or years, affirms the fee in a stranger; as, if he prays in aid of a stranger. *Co. L. 252. a.*

Or, attorns, upon record, to the grant of a stranger. *Co. L. 252. a. 1 Rol. 852. l. 30.*

Or, confesses the action in a writ of entry *in casu proviso*, which supposes the reversion in a stranger. *Co. L. 252. a.*

Or, pleads covinously, to the disherison of him in reversion; as, if in waste by a stranger, he pleads *no waste done.* *Co. L. 252. a. 1 Rol. 853. l. 27.*

Or, in a *præcipe quod reddat* against him, he disclaims. *Bro. Forf. de Terre, 92.*

Or, confesses the action. *2 Leo. 60. 1 Rol. 853. l. 40.*

So, if, by covin with the demandant, a *præcipe* is brought against him and *B.* as joint-tenants, and after the *mise* joined they make default, whereupon final judgment is given; after judgment reversed by disceit, the estate of the lessee shall be forfeited. *1 Rol. 853. l. 30.*

So, if the demandant recovers by render, default, *nient dedire*, or feigned plea of the lessee. *1 Rol. 853. l. 45, 50.*

So, if tenant for life accepts from a stranger a fine *sur conusance de droit*.

*droit come ceo*, &c. for thereby he affirms upon record the reversion to be in a stranger; tho' the reversion is not thereby devested. *Co. L. 252. a. 9 Co. 106. b. Per Hale, 1 Mod. 117. 1 Rol. 852. l. 50.*

If there be tenant for life, remainder for life, &c. and he in remainder accepts a fine *come ceo*, &c. from the tenant for life; it will be a forfeiture of his remainder. *R. 2 Lev. 202.*

If tenant for life, by bargain and sale, conveys to *B.*, and afterwards levies a fine *come ceo*, &c. to him; tho' nothing passes by the bargain and sale but for the life of the tenant, yet when the bargainee accepts a fine from him, it will be a forfeiture. *1 Leo. 264. 4 Leo. 217.*

So, if tenant for life prays in aid, and when the reversion comes in by process, he pleads that he is not the same person.

So, if the reversioner comes in without process, if he be the same person to whom the reversion belongs; for, by his plea, he supposes the reversion in another. *1 Rol. 853. l. 5.*

But it is no forfeiture, if tenant for life vouches a stranger. *Bro. Forf. de Terre, 87.*

If he accepts a fine upon a release. *4 Leo. 217. 1 Rol. 853. l. 2. Dy. 148. b.*

If he attorns to a stranger upon a judgment in a *quid juris clamat*. *1 Rol. 853. l. 23.*

Or, attorns upon a grant by a fine of the reversion in *mortmain*. *1 Rol. 853. l. 25.*

So, if tenant for life pleads an attainder and forfeiture by *A.*, from whom the plaintiff in a *quid juris clamat* claims; tho' the plaintiff shews a reversal, upon which the lessee demurs, and there is judgment against him. *1 Rol. 853. l. 20.*

Or, in a *quid juris clamat* for a rent of 10 *l.*, pleads, that it is but 40 *s.*, and it is found against him. *1 Rol. 853. l. 15.*

So, if tenant for life loses to a stranger by involuntary mispleading. *1 Rol. 853. l. 41.*

#### (A 6.) Entry for the Forfeiture.

(A 6.) *By whom it shall be.*] Entry for a forfeiture ought to be by him who is next in reversion or remainder after the forfeited estate. *Vide Claim, (A 3.—B 2.)—Condition, (G 1, 2.—O 1, 2.)*

As, if tenant for life or years commits a forfeiture, he who has the immediate reversion, or remainder, ought to enter; tho' he has the fee, or only an estate-tail. *1 Rol. 857. l. 45. 50. 858. l. 5.*

Tho' the next remainder was only for life. *Co. L. 252. a. 1 Rol. 858. l. 10.*

If an estate be given to *A.* and *B.* for life, and to the heirs of *B.*; if *A.* makes a feoffment, *B.* may enter. *1 Rol. 858. l. 22.*

But if the next in remainder does not take advantage of the forfeiture, after his estate determined, he in a subsequent remainder may enter; as, if a tenant for life, remainder to *B.* in tail, remainder to *C.* in tail, makes a feoffment, and afterwards *B.* dies without issue before entry, *C.* may enter. *1 Rol. 857. l. 45. 858. l. 20.*

So, if the remainder was to *B.* for life, and *B.* dies. *Mo. 18.*

So, if he in remainder for life will not enter, he in the subsequent remainder, or reversion, may enter in his name for the preservation of the inheritance. *1 Rol. 858. l. 12.*

So,

So, if the lord of a copyholder for life grants a lease for years, to commence after the death, forfeiture, &c. of the copyholder for life, who commits a forfeiture; if the lord will not enter, the lessee may. *R. 1 Rol. 858. l. 25.*

So, if he in remainder or reversion dies before entry, his issue, or heir, may enter. *1 Rol. 858. l. 15. 37.*

So, if he in remainder in tail releases to the feoffee of tenant for life, and dies, his issue may enter; for tho' the father was barred by the release, the issue shall not. *1 Rol. 858. l. 2.*

(A 7.) *By whom, not.*] But he in the next remainder or reversion shall not enter for the forfeiture, if his estate does not continue.

If an estate be to *A.* and a *feme-covert*, and the heirs of the body of the woman by her husband begotten, and the husband dies without issue, whereby the woman is tenant in tail after possibility; if *A.* makes a feoffment, the woman cannot enter, for she was seised before *per my & per tout*. *1 Rol. 858. l. 30.*

(A 8.) *At what time it shall be.*] If lessee for life makes a feoffment, and dies; entry may be made after his death. *1 Rol. 857. l. 25. Vide Claim, (A 4.—B 3.)—Condition, (G 3.)*

If an alienation by tenant for life, or years, be to *A.* for life, remainder to *B.* who enters after the death of *A.*; he in reversion, or remainder, may enter upon *B.* *1 Rol. 857. l. 5.*

Or, if *B.* dies before *A.*, he may enter upon the heir of *B.* *1 Rol. 857. l. 15.*

So, if the alienation be to *A.* in tail, who dies without issue, he may enter upon the alienor. *1 Rol. 857. l. 20.*

So, if the alienation be to *A.* in fee, who aliens to another, he may enter upon the second alienee, tho' he was not a party to the forfeiture. *1 Rol. 857. l. 13.*

But if tenant for life, of an advowson in gross, levies a fine of it, and the church becomes void before entry, he in reversion, or remainder, has lost the advantage of the avoidance; for it was vested as a chattel before the estate of the tenant for life was defeated (for it cannot be defeated without claim, and it cannot be afterwards divested by the presentation of him in reversion). *R. 1 Rol. 857. l. 3.*

(A 9.) Who are bound by the Forfeiture.

A feoffment by a husband, or by husband and wife, of an estate for life, of which the husband is seised in right of his wife, or jointly with his wife, binds only during the coverture. *1 Rol. 851. l. 45. 50. Vide Baron and Feme (K—R). Vide ante, (A 1.)*

(A 10.) What does not excuse a Forfeiture.

Ignorance of his estate does not excuse.

So, a forfeiture shall not be excused for want of notice, where no one is bound to give it; as, if husband and wife are seised for life, remainder to *B.* their son in tail, with the fee expectant, and the husband makes a feoffment with warranty, and dies; if afterwards the wife joins with *B.* in a fine, it will be a forfeiture of her estate for life; for the estate of *B.* in tail, and the fee expectant, was bound by the



the collateral warranty, and *B.* was, as it were, a stranger; tho' the wife did not know of the warranty, no one being bound to give her notice. *R. 1 Rol. 856. l. 15. Cro. Car. 392.*

(A 11.) Dispensation.

(A 11.) *What shall be.*] It shall be a dispensation of the forfeiture, if he in reversion, or remainder, be a party to the estate made, and accept it; as, if a husband, seised in right of his wife for life, leases to him in reversion for his own life. *1 Rol. 856. l. 10. Vide Condition (P).—Copyhold, (M 8.)*

(A 12.) *What not.*] But acceptance of an estate by him, who is within age, shall not be a dispensation of the forfeiture; as, if lessee for life, or years, leases to him in reversion (being within age) for his own life, it will be a forfeiture; for the acceptance by the infant shall not prejudice him. *1 Rol. 855. l. 45.*

So, if he in the next remainder releases, &c. to the feoffee of tenant for life, or years, it will be a dispensation only for his own estate. *1 Rol. 856. l. 1.*

If he in remainder in tail releases, &c. it will be no dispensation as to the issue. *1 Rol. 856. l. 1.*

(A 13.) What does not purge the Forfeiture.

If lessee for life, or years, makes a feoffment upon condition, and afterwards enters for the condition broken; this does not purge the forfeiture. *1 Rol. 856. l. 35. 40.*

(B) Forfeiture for a Crime.

(B 1.) For High Treason.

(B 1.) *What lands* **A** *AS to forfeiture of a copyhold, vide Copyhold, and tenements.] (M 1, &c.)*

As to forfeiture by outlawry, *vide Utlagary, (D 1, &c.)*

If a man be attainted for high treason, he forfeits all his lands and tenements, goods and chattels.

So, his dignity, tho' entailed. *R. 7 Co. 34. Vide Dignity (E).*

And by the *st. 26 H. 8. 13. and 5 & 6 Ed. 6. 11.* (which is not repealed by the *st. 1 Mar. ss. 1. ch. 1.*) he shall forfeit all such lands, &c. of which he shall have any estate of inheritance in his own right, in use or possession.—Which extends to his lands in tail, as well as in fee-simple. *St. P. C. 187. 2 Lev. 170. R. 7 Co. 34. b.*

So, he forfeits his right of entry into any lands or tenements. *St. P. C. 187, 8. Vide post. (B 2.)*

Entry for a discontinuance.

If tenant in tail discontinues in fee, the right to the entail is forfeited. *R. 2 Rol. 504. Jon. 71.*

So, an annuity of inheritance shall be forfeited; for it is an hereditament. *R. 7 Co. 34. b.*

[If *A.* has a freehold lease, and is attainted on *8 & 9 W.*, it is forfeited to the crown. *Kirton v. Horton, 1709, Foster, 223.]*

So, where since *26 H. 8. 13. and 5 & 6 Ed. 6. 11.* it is enacted, that all the lands, tenements, hereditaments, &c. of *A.* shall be forfeited;

feited; this extends to lands which *A.* had in tail. *R. 2 Mod. 133. 2 Jon. 57. 1 Vent. 299.*

Tho' the entail was to *A.* and his wife, and the heirs of their bodies, and the wife survives. *R. 1 And. 39.*

So, he forfeits all evidences and charters which concern the lands or tenements forfeited, and the king shall have them. *St. P. C. 187. b.*

So, if a condition be given to the king, as forfeited for high treason, the king may tender gold, to defeat a settlement upon condition to be void by a tender of the feoffor. *R. 7 Co. 13. 1 And. 294.*

So, if by statute all lands, rights, interests, &c. are forfeited an estate-tail is forfeited. *R. 2 Lev. 170.*

[If *A.* entails his estate in *Scotland* on himself for life, remainder to *B.* his eldest son, and the heirs-male of his body, remainder to the heirs-male of *A.*'s own body, with subsequent limitations, and the reversion to the heirs and assigns whatsoever of *A.*, with prohibitive, irritant, and resolute clauses; and *A.* dies, leaving *B.* and another son *C.* *B.* is attainted of high treason; the estate is forfeited to the crown during his life, and the continuance of such issue-male of his body as would have been inheritable to the said estate *tailzie*, and also for such estate and interest as vests in him by the limitation to the heirs whatsoever of *A.* after the substitutions determined; and after the death of *B.*, and failure of his issue-male, *C.* shall succeed by virtue of the substitution to the heirs-male of the body of *A.* *Gordon of Park's Case, 1751, Foster, 102.*]

[If the estate is limited to *A.* and the heirs-male of his body, without any previous limitation to his son *B.*, and *B.* on his father *A.*'s death becomes entitled as heir of his body, and is attainted of high-treason, the whole entail is forfeited by his attainder, as long as there are heirs-male of the body of *A.* *Mercer's Case, 1753, Foster, 102.*]

But he does not forfeit lands and tenements, which he has *en autre droit*: as, in right of his church. *St. P. C. 187. b.*

Or, in right of his wife. *St. P. C. 187. b.—Cont. semb. Lane, 54.*

So, by the common law, he does not forfeit an use, or lands in trust for him. *12 Co. 2. Dub. Hard. 405. 1 Sid. 260. R. Hard. 495. (Vide 2 Cro. 513.)*

So, he does not forfeit rights of action for the recovery of an estate in a stranger.

So, he does not forfeit lands, which he has as trustee for another. *Cont. Lane, 39. 54. Vide Roy (D).*

So, if a term attends the inheritance, which was in trust for a felon; the inheritance not being forfeited, the term shall not be so. *R. Hard. 495. Vide post. (B 2.)*

So, he does not forfeit the right, which a stranger has, to lands in his possession. *Jon. 71.*

So, if a man tenant in tail levies a fine to the same uses, where the estate-tail is not forfeited, this seisin in fee, for an instant at the time of the fine, shall not make a forfeiture. *R. 2 Lev. 170.*

[*A.* who is tenant for life, with power to make leases for three lives or twenty-one years, makes a lease to trustees for ninety-nine years, if he so long live, for payment of his debts; and appoints them his attornies, to make leases pursuant to the power; *A.* is outlawed

lawed for high-treason; the trustees shall not make the leases to the nominees of the crown. *Attorney-General v. Bradyll, in Sc. M. 1721, Bunb. 927.*

[For the treasons in 5 *Eliz. c. 1.* concerning the papal supremacy, 5 *Eliz. c. 11.* and 18 *Eliz. c. 1.* touching the coin, no forfeiture of lands shall be but during the life of the offender. For the treasons in 8 & 9 *W. 3. c. 25.* and 15 and 16 *G. 2. c. 28.* the lands are forfeited. The blood is corrupted for neither. *Foster, 223.*]

[In high treason the forfeiture accrues to the crown (of whomsoever the land is holden) *propter delictum tenentis*, and this tho' the blood of the heir is saved, for the offence is purged by that; but in felony, saving the blood preserves the descent to the heir, because the lord is entitled by escheat *propter defectum sanguinis*. *Foster, 223.*]

(B 2.) *What goods and chattels.*] So, for high treason, he forfeits all goods and chattels, which he had in possession in his own right.

Or, to which he had right. *St. P. C. 188.*

So, a term for years, and goods in trust for him. 1 *Sid. 260. R. 1 And. 294. 2 Cro. 512, 3: Vide ante, (B 1.)*

[Tenant at will has nothing to forfeit. *Denn v. Fearnside, M. 21 G. 2. 1 Wilf. 176.*]

So, he forfeits bonds, and other securities for money; and the king, or his grantee, may maintain an action in his own name. *St. P. C. 188. a. 12 Co. 2.*

So, debts due upon contract. *St. 188. a. 12 Co. 2.*

So, a right to have an action. *St. 188. a. Vide ante, (B 1.)*

But it was held that a *chose en action* is not forfeited. *Sav. 40.*

Nor, a right to an action *in gross*. *Jon. 71.*

So, he forfeits goods in his possession, of which the property is not known: as, if *A.* bails money, or corn out of a sack or bag, to *B.*, who is afterwards attainted, the king shall have it; for being out of a bag, one cannot be known from another. *St. P. C. 188: a.*

So, goods in his hands, which he stole, tho' the property is not in him. *St. 188. a:*

But, a right to have an action for a wrong to his person, is not forfeited: as, for a battery. *St. P. C. 188. a.*

So, goods in the hands of a man attainted, by bailment, &c. if they can be known, shall be restored to the owner, if he shews the bailment before the justices, and upon inquest it be found so. *St. 188. d.*

So, he does not forfeit goods which he has as executor, or administrator. *St. 188. b.*

So, if a man, indicted for high treason, stands mute, or refuses to answer, he shall have the same judgment by attainder, as if he was convicted by verdict, or confession. *Co. L. 391: a.*

So, if a man be killed in levying war against the king, he forfeits his lands, goods, and chattels. *St. 189. a.*

So, if he be killed in pursuit upon an escape, or upon his arrest, he forfeits his goods and chattels. *Vide post. (B 3.)*

So, if a man be attainted for high treason, his blood is corrupted. *Co. L. 41. a. 391. b. Vide Discent, (C 13.)*

And his wife shall lose her dower; for the *st. 1 Ed. 6. 12.* which gives her dower, is repealed by 5 & 6 *Ed. 6. 11.* *Vide Dower, (A 2.)*

And she shall lose her dower against the feoffee of the husband, as well as against the lord by escheat. *Co. L. 41. a.* So,



So, her dower *ad osium ecclesiæ*; or, *ex assensu patris*. *Co. L. 41. a.*  
 So, dower by custom. *Co. L. 41. a.*

Where by statute corruption of blood is prevented in cases of high treason, the forfeiture of lands and goods continues; for they are directly forfeited, and not by way of escheat: and therefore the forfeiture remains without express words. *R. 1 Sal. 85. Vide post. (B 3.)*

(B 3.) For *Petit* Treason or Felony.

So, if a man be attainted for *petit* treason, or felony, he forfeits all his lands and tenements, which he had in fee in his own right. *Co. L. 41. a.*

Or, if he be outlawed, or abjures the realm. *Co. L. 390. b.*

So, the profits of lands, which he had in tail, during his life; but not his estate of freehold. *Dub. 2 Leo. 123. 126. 3 Leo. 185. 4 Leo. 112.*

So, he forfeits all his goods and chattels. *Co. L. 41. a.*

[And they are forfeited to the crown, without being subject to the debts of the felon; unless they are expressly made liable by letters of administration, granted with the consent of the king, advocate-general, &c. under the authority of the royal sign manual. *Dougl. 542.*]

[A *felo de se* forfeits his goods and chattels, but not his lands nor his wife's dower. *Ibid.*]

So, a lease for years in trust for him. *Hard. 405. Semb. cont. 1 Sid. 403.*

So, a *chose en action*: as, a bond, covenant for payment of money, &c. *R. Noy, 155.*

But he does not forfeit things not held of any one; as, fairs, markets common, rents charge or seck, warren, corody, &c. of which he is seised in fee; but the king shall have them for his life, and afterwards they are extinct: for they cannot descend, where the blood is corrupted, nor escheat, where there is no tenure. *3 Inst. 21.*

So, if he be convicted for *petit* treason, or felony, he forfeits all his goods and chattels. *Co. L. 391. a.*

So, if he fled, or was sued to the exigent, tho' he be afterwards acquitted. *Vide supra. Vide Waife (B).*

So, if he be arrested for treason, or felony, and escapes, and in the pursuit is killed; upon presentment before the coroner, or justices of B. R., &c. he forfeits his goods and chattels. *St. 189. a.*

So, if he be killed in resistance upon the arrest. *St. 189. a.*

But, for *petit* larceny a man does not forfeit his lands, or goods. *Co. L. 41.*

So, if he be found guilty of grand larceny, and has his clergy, or be burnt in the hand, another found guilty, as accessory to the same felony, does not forfeit his lands, or goods; for he ought to be discharged, the principal not being attainted. *R. Cro. Car. 567.*

So, by the *st. 1 Ed. 6. 12.* a wife does not lose her dower by the attainder of her husband for felony.

So, the goods of a wife, married after conviction and clergy had, are not forfeited. *Noy, 6.*

So, in felony, where a statute prevents corruption of blood, the forfeiture of lands is prevented as a consequence; for the forfeiture

is by way of escheat, for defect in the descent by reason of the corruption of the blood. 1 *Sal.* 85. *Vide ante*, (B 2.)

So, if a man be pardoned before conviction, he does not forfeit his goods, or the profits of his lands. 5 *Co.* 110. *b.*

So, if a man be found guilty of homicide *se defendendo*, he shall lose his goods and chattels. *H. P. C.* 41.

So, if he be indicted for it before the coroner, and that he fled. 2 *Inst.* 316. *Dy.* 238. *b.*

So, if he be indicted for homicide *se defendendo*, or by misadventure, and be outlawed. 2 *Inst.* 316.

Tho' upon verdict after his arraignment it be found that he did not fly; for this does not controul the finding before the coroner. *R. Dy.* 238. *b.*

But in homicide *se defendendo*, there shall be a pardon of course for his goods. *H.* 40. 2 *Inst.* 316.

And by the *st.* 24 *H.* 8. 5. if any kill a person, who lies in wait to murder or rob him, or to commit burglary, he shall not forfeit his goods or chattels.

[Nor, lands or tenements.]

So, in an appeal, as well as upon an indictment, a man found guilty *se defendendo*, or by misadventure, shall have a pardon of course. 2 *Inst.* 316.

And the king cannot refuse it; and therefore, it shall be granted by the chancellor, without the king's warrant. 2 *Inst.* 317.

Yet, if it be found that a man made an assault upon another near the highway, without saying, that it was *ad murdrandum*, it is not sufficient to excuse his goods. *R. Bend. pl.* 86. 1 *And.* 41.

(B 4.) When the Forfeiture shall be seized.

After conviction, the sheriff, or his bailiff, &c. may seize the goods of a felon convict, for the king. *Co. L.* 391. *a.* *St. P. C.* 192. *b.* *Vide post.* (B 7, 8.)

So, by the *st.* 25 *Ed.* 3. *st.* 5. *c.* 14. after indictment of felony, and *capias* returned *non est inventus*, a second *capias* shall go returnable in three weeks, comprising also, that the sheriff seize his goods, and keep them till the return of the writ; and if then he render not, nor be taken, he shall lose his goods: if taken, or he render, his goods are saved.

So, by the *st. de officio coronatoris*, 3 (4) *Ed.* 1. if any be found guilty of homicide the coroners shall go to his house, & *inquirant que catalla & blada habeat, quam terram, & quantum valet per annum, & appreciari faciant ut vendi possint, & deliberentur villata, ut inde respondeant coram iusticiariis.* *St. P. C.* 50. *c.* 192. *b.*

But by the *st.* 1 *Ric.* 3. 3. no sheriff, bailiff, &c. shall seize the goods of a felon, before he be convict for the felony. *Co. L.* 391. *a.* *St. P. C.* 193.

And this was a declaration of the common law. *Hard.* 97. *St. P. C.* 52.

If he may seize, inrol, and deliver to the vill; he cannot remove. *St. P. C.* 192. *b.*

(B 5.) To whom the Forfeiture shall be.

By the common law, if a man be attainted for high treason, the forfeiture

feiture shall be to the king, of whatever lord the lands are held. *St. P. C. 197. a. Co. L. 13. a.*

So, if a man be attainted for *petit* treason, or felony, the king shall have year, day, and waft. *Vide Ann, Jour, and Wast.*

But, upon an attainder for *petit* treason, or felony, the forfeiture of the lands and tenements of the felon shall be to the lord of whom the lands are held.

[Where a surrender is made to one who is convicted of felony and hanged before admittance, the lands are not forfeited to the lord, but descend to the heir of the surrenderor. *2 Wilf. 13.*]

So, if a man has by grant *jura regalia*, the forfeiture of lands in fee-simple for an offence, which was high treason at the time of the grant, shall be to the patentee. *R. Dy. 289.*

(B 6.) To what Time it shall relate.

If a man be attainted for treason, or felony, by verdict, or confession, the forfeiture (as to real estate) relates to the time of the offence, to avoid all alienations afterwards. *Co. L. 390. b. Stamf. 192. a.*

Otherwise, if he be attainted upon an appeal, by verdict or confession. *Vide infra.*

So, if he be attainted by outlawry upon an indictment. *Co. L. 390. b. 13. a. R. 30. H. 6. 5. a.*

So, if a man be convicted in a *præmunire*. *Dub. Cro. Car. 173. Jon. 217.*

So, if a man be a fugitive beyond sea, it relates to the time of his flight. *R. 2 Cro. 82.*

So, if a man be *felo de se*, the forfeiture relates to the fact. *1 Lev. 8.*

And is vested in the king before inquisition found. *R. 1 Lev. 8. R. 2 Cro. 82.*

But the forfeiture of goods and chattels relates to the time of the conviction. *St. P. C. 192. a. Co. L. 391.*

So, upon presentment of the coroner, of a *fugam fecit*, the forfeiture relates to the day of the presentment. *St. 192. a.*

So, if it be found by verdict that he fled, to the time of the verdict. *St. 192. a.*

To the time of the indictment, or acquittal. *5 Co. 109. b.*

So, the forfeiture as to the *mesne* profits of lands relates only to the conviction. *Co. L. 390. b.*

So, the forfeiture by outlawry upon an appeal; for the time of the offence is not mentioned in the count. *Co. L. 390. b. 13. a.*

(B 7.) When it shall not be seized.

But lands or goods of any indicted for treason, or felony, cannot be seized into the king's hands before attainder. *2 Inst. 48. Vide ante, (B 4.)*

Neither can they be granted before, by the king to another. *2 Inst. 48.*

So, a man ought to live upon his goods, and the profits of his lands, till he be attainted. *2 Inst. 48. St. P. C. 192, 3.*

(B 8.) In what Manner seized.

After conviction by judgment, or outlawry, for high treason, &c.



a commission goes to persons named by the king, or the attorney-general, to inquire, what lands and tenements the offender had at the time of the treason committed, and the value; and that they seize them into the king's hands.

And the inquisition taken thereon shall be returned to the court of *Exchequer*, and filed in the office of the king's remembrancer. *Lut.* 997.

So, after conviction for felony, a *scire facias* shall go against the vill, or any other, who has the goods in his custody. *St. P. C.* 194.

But if any one has title to the goods or lands found by inquisition to be the goods or lands of the offender, he may make his claim, by pleading his title. *Lut.* 998. (*Vide Prærogative*, D 83, 84.)

To which the attorney-general shall demur, or reply.

[On certificate of commissioners of forfeited estates, that defendants were possessed of lands forfeited, and did not disclose them according to statute; the court would not grant *scire facias*, but said they proceed as for lands forfeited for high treason. *Rex v. Tenants of Lord Derwentwater*, T. 1717, in *Sc. Bunb.* 14.]

[But by *stat.* 4 G. on such certificate, the *Exchequer* is to proceed as on an inquisition; and the court afterwards ordered a *sci. fa.* on such certificate, as on an inquisition found. *Bunb.* 14.]

### (C) Forfeitures by Penal Statutes.

SO, in all cases where a penalty or forfeiture is given by act of parliament, without saying, to whom it shall be, or a limitation for a recompence for the wrong to the party, it belongs to the king.

[A penalty given by statute, without saying to whom, or how, to be recovered, is a debt to the king, and must be sued for in the *Exchequer*. *Rex v. Malland*, H. 2 G. 2. *Str.* 828.]

If the penalty or forfeiture is given for a nonfeasance as well as for a misfeasance.

And therefore, where by the *st.* 5 & 6 Ed. 6. 16. if any sell an office, &c. he forfeits his right, interest, &c. in such office, deputation, gift, or nomination to it; in such case, the gift, or nomination, belongs to the king. *R.* 2 Vent. 267.

[Where the statute only enacts the forfeiture, (as 50 *l.* for the marshal not giving a note testifying the defendant's being in his custody,) the court cannot make a rule for payment; it must be recovered by action. *Woodcock v. Elpington*, E. 3 G. *Str.* 50.]

#### [(C 2.) How a Forfeiture shall be interpreted.]

[A forfeiture shall be construed favourably.]

[Therefore, under the *st.* 8 G. 3. c. 38. which enacts that the masters, &c. of every boat, &c. navigating the *Birmingham* canal, shall give a just account in writing, &c. to the collectors, &c. of what quantities of goods shall be in the boat. And in case they refuse or neglect to give such account, or shall give a false account, they shall forfeit 10*s.* for every ton of goods which shall be in such boat of which account shall be so refused to be given, or of which such false account shall be given; it has been determined that the penalty of 10*s.* shall not be calculated on the whole of the goods in the boat, but

but on the difference between the quantity really in the boat, and the quantity specified in the account. *Cowp.* 585. 5.]

[(C 3.) In what Cases one Penalty only, and in what, several shall be incurred when there are several Offenders.]

[Where an offence made penal by statute is in its nature single; one single penalty only can be recovered, tho' several join in committing it. *Cowp.* 612.]

[Thus the offence of impounding a distrefs in a wrong place, against *ft. 1 & 2 P. & M. c. 12.* though done by many, is but *one* act, and shall be satisfied by *one* forfeiture. *Ibid.*]

[So, that for killing a hare under *ft. 5 Ann. c. 14.* is but *one* act, and incurs *one* forfeiture, tho' done by many. *Ibid.*]

[But if the offence be in its nature several, each offender is separately liable to the penalty. *Ibid.*]

[Thus the offence of obstructing a custom-house officer contrary to *ft. 8 G. 1. c. 18. s. 25.* is an offence in its nature several, for one may obstruct him in one way, and another in another: and therefore, on an information and verdict against *several* persons for that offence, each is separately liable. *Cowp.* 610.]

[(C 4.) Where one Penalty only, and where more may be incurred in *one* Day.]

[A person can commit but one offence on one day, against the *ft. 29 Car. 2. c. 7.* by exercising his ordinary calling on a *Sunday*. *Cowp.* 640.]

[But two penalties may be incurred on the same day, on the *12 G. 2. c. 36.* for selling books, the originals of which were written and published here, and afterwards re-printed in another country, and imported into this, if the acts of sale be distinct. *3 T. R. 509. Vide the Statutes in the respective Cases.*]

[In a penal action, if the jury find a verdict for the plaintiff, in one penalty generally, and the plaintiff apply it to one count, he cannot afterwards apply it to another, tho' the former be bad in law, and tho' the evidence would have warranted the verdict on any other count. *Id.* 448.]

*Vide more concerning Forfeiture, in Chancery, (3 L.—4 D. 2.)—Copyhold, (H 7.—M 1, &c.)—Forcible Entry, (D 26, 27.)—Franchises, (G 3.)—Liberties, (C 1, 2.)—Market (I.)—Officer, (K 2. 8. 11, &c.)—Patent, (F 3.)—Prærogative, (D 60.)*

## FORGERY.

(A) Forgery; What shall be.

(A 1.) By the Common Law.

**F**ORGERY is where a man fraudulently writes, or publishes a false deed, or writing, to the prejudice of the right of another.

[Forgery may be committed of any writing, tho' not a deed; and altho'

altho' no actual prejudice ensues from it, but only a possibility of it. *Rex v. John Ward of Hackney, H. 13 G. Str. 747. Ld. Raym. 1461.*]

So, if he erases words out of a deed.

If he falsifies a copy of a deposition upon record, by erasing the words (*that did*) whereby the deposition is made more positive. *3 Russ. App. 2. 39.*

If a devise be to *A.* for life, remainder to *B.* in fee, if a man writing the will omits the estate for life. *Mo. 760.*

But, if a man alters a deed to his prejudice, it will not be a forgery; as, if the obligee makes the obligation to be for a less sum. *1 Sal. 375.*

If a man indorses *Exchequer* bills, as received for customs, where he is not an officer; for he prejudices himself only. *R. 1 Sal. 375.*

So, if he omits to insert in a will, &c. a legacy, or other thing; if the devise made be not altered thereby, it is no forgery. *R. Mo. 760.*

If he writes a will for a person non-sane, and delivers it to him; it is no forgery, but a misdemeanor, if he knew it. *Mo. 760.*

[*Vide 1 Hawk. Leach, 335. 339. Str. 1144.*]

(A 2.) By the *St. 5 El. 14.*

By the *St. 5 El. 14.* (by which all former statutes for forgery are repealed,) any, who shall of his own head, or by fraud with others, &c. forge, make, or cause to be forged, &c. any false deed, charter, or writing sealed, court-roll, or will, to the intent to molest, &c. the freehold, inheritance, right, &c. of lands, freehold or copyhold: or shall publish, or give it in evidence, knowing it to be forged, being convict by action founded on this statute at the suit of the party grieved, or otherwise according to course of law, or by information in the Star-Chamber, shall pay double costs and damages to the party grieved, be set on the pillory, have both his ears cut off, his nostrils slit and seared with hot iron, forfeit his lands, &c. to the queen for life, and suffer perpetual imprisonment. (*Vide 2 Geo. 2. 25. and 7 Geo. 2. 22.*)

And if any of his own head, or by fraud with others, forge, or cause, or assent to be forged, any charter, deed, or writing, to the intent any may claim an interest for years in lands, &c. not copyhold, or an annuity, in fee, tail, or for life or lives, or years; or any obligation, release, or other discharge of debt, action, &c. or shall publish or give in evidence such deed, writing, obligation, &c. knowing it to be forged, being convict as aforesaid, shall forfeit double costs and damages to the party grieved, be set on the pillory, &c. lose one ear, and be imprisoned for a year without bail, &c.

[And the second offence is made felony, without benefit of clergy.]

[For the points resolved in the construction of this statute, *vide 1 Hawk. Leach, 341, et seq. and Str. 901.*]

[For the subsequent statutes relating to forgery, see *1 Hawk. Leach, 204. 213.*]

[For the points resolved on many of these subsequent statutes, see *id. ibid. and Doug. 300. 4 T. R. 28.*]



(B) Remedy for Forgery.

(B 1.) By Action.

AN action for deceit lies by the common law against a forger of false deeds: as, if he forges a statute, obligation, or other speciality in the name of B. *F. N. B.* 96. B. (*Vide the margin ibid.*) *Vide Action upon the Case for Deceit, (A 2.)*

Or, the grant of a presentation by an abbot under the seal of his convent. *F. N. B.* 96. C.

Or, letters of resignation, by a parson, of his benefice. *F. N. B.* 99. K.

So, by the *st. 5 El.* 14. the party grieved may sue his action of forger of false deeds on that statute by original, or by bill in *B. R.* or in the *Exchequer*.

And in such action of forger, &c. shall have the same process as in trespass.

But, in such action, the plaintiff's release shall discharge only his costs and damages, and the court may proceed to judgment and execution for the other penalties.

*Vide Pleader, (2 S 26.)*

(B 2.) By Indictment.

So, he may be indicted for forgery, by the common law. *Vide Indictment, (D—G 3. 5.)*

And by the *st. 5 El.* 14. the justices of oyer and terminer, and justices of assize, in their general sessions, &c. may hear and determine the said offences, and award process, &c. as they may against any indicted before them of trespass.

But justices of the peace have no jurisdiction of forgery upon the *st. 5 El.* 14. *Crompt. Just.* 56. b. *R. Cro. El.* 87.

Nor, of felony for the second offence; for they have not the record of the first conviction before them. *Crompt. J.* 56. b.

Tho' they are justices of peace, and also of gaol-delivery. *R. Cro. El.* 697.

The indictment shall be good, if it pursues the words of the statute, tho' it be improper Latin: as, if it says, *quod super caput suum proprium fabricavit*: for it is pursuant to the words of the statute. *R. 2 Lev.* 221.

So, if it alleges that A. seized Jaywick, B. *cum intentione ad molestand. falso fabricavit factum per quod B. conveyavit Jaywick-Park, &c.* for tho' there be a variance in the name of the lands, yet the intent to disturb A. is the fact which the jury ought to find, and is sufficiently alleged. *R. F. g.* 57. 261.

But if an indictment says, that such a one *contrafecit scriptum continens in se scriptum obligatorium*, it will be bad; for it is repugnant, and impossible. *R. 3 Mod.* 104.

[As follows is a sufficient averment of the tenor of a forged receipt in an indictment. And it is only necessary to aver a general intent to defraud, without setting forth the manner in which it was to be effected. *2 Bl. Rep.* 787.]

[An indictment for forging a paper-writing, purporting to be the will of A. B., is good. *Id.* 790.]

[On an indictment for the forgery of a will of personal estate, a probate is conclusive evidence in favour of the defendant. *Rex v. Vincent*, M. 8 G. 8. Str. 481.]

[In an indictment for forging a bill of exchange, it is not necessary that it should be stamped in order to be received in evidence, though by 23 G. 3. c. 49. which imposes a stamp-duty on such instruments, it is said that no bill of exchange shall be received in evidence unless it be first duly stamped. 2 T. R. 606.]

## F O R M.

*Vide Amendment (D 5.—L 1.—W—X).*

## F O R M A P A U P E R I S.

(A) Suit in *Forma Pauperis*.

**B**Y the *stat.* 11 H. 7. 12. every poor person having cause of action, or suit, shall have by the chancellor a writ original, or *subpœna*, without paying for sealing or writing the same. And the chancellor shall assign clerks to write, and counsel and attorney for the same, without reward taking.

So shall the justices of B. R., C. B., barons of *Exchequer*, and all other justices in courts of record where such suit shall be.

And therefore, in *Chancery*, and every court of record, the plaintiff having cause of suit, upon *affidavit*, that he has not 5 *l.* above the matter in question, shall be admitted to sue *in forma pauperis*.

And by *Ord. Cla.* no counsel, attorney, &c. assigned, shall take fee, or agree for recompence, &c. on pain of censure by the court; nor refuse to prosecute or defend for such *pauper*. *Vide Rules and Orders of Chancery*.

And by order 18th Novem. 20 Car. 2. no *pauper* writs shall pay fees for sealing.

So, a woman, indicted by her husband for a misdemeanor, shall be admitted to defend *in forma pauperis*. *Mod. Ca.* 88.

[Defendant on an indictment may be admitted *in forma pauperis*. *Rex v. Wright*, P. 9 G. 2. Str. 1041. B. R. H. 211. 253.]

[A person convicted of perjury, and outlawed for forgery, may be admitted to plead the king's pardon *in forma pauperis*. *Rex v. Morgan*, M. 18 G. 2. Str. 1215.]

[But these are cases at common law, and not under the statute; for it has been held that in an action the defendant cannot be admitted to defend *in forma pauperis*. *Id. ibid.* and *Barnes*, 328. Str. 1041. B. R. H. 211. 253.]

[Defendant on an attachment for a contempt, where there is no cause in court, is not admitted to defend *in forma pauperis*. *Rex v. Pearson*, T. 33 & 34 G. 2. 2 B. M. 1039.]

[And a defendant removing an indictment by *certiorari* without good cause, cannot be admitted a *pauper*. 1 Bl. Rep. 230.]

So, by the *stat.* 5 & 6 W. & M. 21. and 9 & 10 W. 3. 25. he shall be excused stamp-duties who is admitted to sue or defend *in forma pauperis*.  
So,

So, by the *ſt.* 2 *G.* 2. 28. a person attested on a *capias*, or information, relating to the customs, making *affidavit* before a judge, or commissioner to take affidavits, that he is not worth 5 *l.* beside his wearing apparel, if he petition to defend in *formâ pauperis*, the judge in discretion may admit him so to do, and assign counsel, attorney, or clerk, who shall take no fee or reward,

But by the *ſt.* 23 *H.* 8. 15. a plaintiff admitted as *pauper*, if nonsuit, &c. instead of paying costs, shall suffer such other punishment as the justices of the court where the suit depends shall think reasonable.

So, if he be admitted, tho' he was dispaupered before nonsuit. *R.* 1 *Rol.* 88.

And a *pauper*, being nonsuited, may have corporal punishment. 1 *Rol.* 88.

And the usual course is, that costs are taxed, and if he does not pay, he shall be whipped; except where the court in discretion (as it may) directs that he shall be excused from both. 1 *Sid.* 261. *Sal.* 506.

By rule in the *Exchequer* 47, a petitioner to be admitted in *formâ pauperis* shall bring a certificate under counsel's hand, that he hath probable cause of suit, and take the usual oath, &c. *Vide Rules and Orders in Exchequer.*

So, by a rule in *B.R.* *H.* 3 & 4 *Jac.* 2. *nullus admittatur in formâ pauperis extra curiam.*

[The court may admit persons to sue in *formâ pauperis* at any time. *Langley v. Blackerby*, *H.* 12 *G.* 2. *Andr.* 306. *Vide* 3 *Wils.* 24.]

[Plaintiffs are not admitted to sue in *formâ pauperis*, unless counsel certifies that there is some foundation for suing; nor prosecutors to prosecute, unless some special ground is laid for the motion. *Rex v. Clarke*, *H.* 2 *G.* 3. 3 *B. M.* 1308.]

[Admission in *formâ pauperis* in *Chancery* is not binding on the officers of *B. R.*; so that on an issue out of *Chancery* to be tried in *B. R.* the party must be admitted again. *Gibson v. M'Carty*, *T.* 9 *G.* 2. *B. R.* *H.* 311.]

So, by order in the *Exchequer* 1717, no *pauper* is to be admitted but by consent of the clerk and counsel assigned to be standing counsel; and if admitted after commencement of the suit, the *pauper* to give security to pay the costs before admittance.

[The affidavit to ground the order for admission to sue in *forma pauperis*, must be made by the plaintiff himself, and not by a third person. 2 *Brown.* 273.]

So, if a *pauper* contracts for the benefit of suit, he shall be dismissed, and never afterwards retained. *Per Ord. Cla.* *Vide Rules and Orders of Chancery.*

So, if he gives, or agrees to give, a fee or recompence; he shall be dispaupered, and never afterwards admitted. *Ord. Cla.* *Vide Rules and Orders of Chancery.*

So, if he has an estate in possession, tho' it be mortgaged above the value. *Per Holt*, two *J. cont.* *Sal.* 507.

So, if he gives notice of trial, and does not proceed. *Sal.* 506.

[Costs cannot be given against a *pauper* lessor of the plaintiff, for not going on to trial; if vexatious, he may be dispaupered. *Nokes v. Watts*, *Fort.* 319.]

[But



[But if costs are taxed, he shall pay them before he try the cause. *S. C. Str.* 420.]

[If pauper is nonsuited on a slip of the attorney, notwithstanding which defendant might have gone into the merits, the court will not stay proceedings in another action till he pays the costs of the former. *Winter v. S'ou, M.* 4 G. 2. *Str.* 878.]

[If pauper is nonsuited, brings a second action, and recovers, costs of the first shall not be deducted out of the recovery in the second. *Butler v. Inneys, H.* 4 G. 2. *Str.* 891.]

[If pauper gives several notices, and does not go on to trial, the court will not restrain him from going on to trial till he has paid costs of former notices, but they will make an order to dispauper him *nisi*. *Taylor v. Lowe, T.* 7 G. 2. *Str.* 983.]

[If defendant in ejectment obtains trial at bar, on consenting to pay bar-costs, and to receive *nisi prius* costs, and then lessor is admitted *in forma pauperis*, and has a verdict against him; yet he shall not pay costs before he brings another ejectment. *Britain v. Greenville, M.* 13 G. 2. *Str.* 1121.]

[Pauper shall not pay costs, tho' dispaupered; if taken on execution for costs, he shall be discharged on motion. *Solomon v. Aynel, 11 G. Fort.* 320. *Vide 3 Wilf.* 24.]

So, by *Ord. Cla.* process of contempt at a pauper's suit shall not be sent to the great seal, till signed by the fix-clerk, who shall take care that it be not vexatious. *Vide Rules and Orders of Chancery.*

[A pauper will not be allowed to amend his bill by striking out defendants' names, without payment of costs. 2 *Brown.* 272.]

### FORMEDON.

*Vide Pleader, (3 E 1, &c.)*

### FOWLING.

*Vide Justices of Peace, (B 45, 46.)*

### FOWLS.

*Vide Dismes, (H 9.)*

## FRANCHISES.

### (A) How they may be claimed.

#### (A 1.) What by Prescription.

**A**LL franchises are derived from the king, and ought to be claimed by charter, or by prescription, which supposes the grant of the king. 2 *Inst.* 281. 495. *Per Finch, Quo. W.* 9 Co. 27. b. *Vide Prescription (C—D).*

Any thing which may be claimed without matter of record, may be claimed by prescription. *Co. L.* 114.

As, a privilege to be a corporation. *Co. L.* 114. *Vide post. (F 4.) Tenere placita. Co. L.* 114. b. 2 *Rol.* 270. l. 52. *Vide Courts, (P 1.)*  
To

To have treasure-trove. *Co. L. 114. b. Vide Waife (G).*  
 Waifes and estrays. 5 *Co. 109. b. Co. L. 114. b. Vide Waife*  
 (A 1, 2.—F).  
 Wreck of the sea. *Co. L. 114. b. Vide Wreck.*  
 A court-leet, and other courts. *Co. L. 114. b.*  
 Royal fishes; as, whales, sturgeons, &c. *Ibid.*  
 Fairs, markets, &c. *Ibid.*  
 Frank-foldage. *Ibid.*  
 The custody of a gaol. *Ibid.*  
 So, a man may make title to land by prescription. *Ibid.*

## (A 2.) What not.

But franchises and liberties, which cannot be seized before the cause of forfeiture appears upon record, cannot be claimed by prescription. *Co. L. 114. 2 Rol. 270. l. 20. 5 Co. 109. b.*

As, *bona & catalla proditorum, felonum de se, fugitivorum, utlagatorum, vel in exigend. positorum, &c. Co. L. 114. a. R. 5 Co. 109. R. 9 Co. 24. b. Vide Waife (B—C—D).*

Consuance of pleas. *Co. L. 114. a. Vide Courts, (P 2, &c.)*

Deodands. *Co. L. 114. a. Vide Waife, (E 1, 2.)*

Privilege to have a sanctuary. *Co. L. 114. a.*

To make a corporation. *Co. L. 114. a. Vide post. (F 1, &c.)*

To make a coroner, or conservator of the peace. *Co. L. 114.*

To have fines *pro licentiâ concordandi.* *Jon. 271.*

But a man may claim these privileges indirectly by prescription; for he may claim a county palatine by prescription, to which *jura regalia* belong. *Co. L. 114. b. Vide post. (D 1, &c.)*

## (B) Confirmed.

**U**PON prayer of the commons 21 *Ed. 3.* to the king to restrain the granting of franchises, it was answered, that they shall be granted by good advice. 2 *Rol. 203. l. 30.*

But by the *st. M. Ch. 9 H. 3. 9 & 37. civitas Londinensis, & omnes alie civitates, burgi, & ville habeant omnes libertates & liberas consuetudines suas.*

By the *st. 34 Ed. 1. 4. de tallagio non concedendo, habeant ita libere, sicut aliquo tempore habuerunt.*

And all liberties were afterwards confirmed by the *statutes 1 Ed. 3. 9. 14 Ed. 3. 1. the stats. 1 H. 4. 1. 2 H. 4. 1. 7 H. 4. 1. 9 H. 4. 1. 13 H. 4. 1. the st. 3 H. 5. st. 2. c. 1. the st. 2 H. 6. 1.*

## (C) Allowed in Eyre.

**F**RANCHISES, which do not lie in prescription, but are only allowable by charter, if the grant was before time of memory, viz. before the time of king *R. 1.*, may be claimed by charter of confirmation, or allowance in eyre. *B. R., C. B., or Exchequer,* without shewing the original grant. 2 *Inst. 281. 9 Co. 28. a. 2 Rol. 201. l. 5. 10.*

And without such confirmation, or allowance, they cannot be claimed. 2 *Rol. 200. l. 40. 45. 1 Rol. 112. Jon. 284. 289.*

So, a grant of discharge, or exemption, before time of memory, shall

shall be of no effect, without a confirmation or allowance; tho' it has never since been charged. 2 *Rol.* 200. l. 50.

An allowance in *eyre* is peremptory to the king. 2 *Rol.* 201. l. 20.

Not in *B. R.*, &c. if the grant afterwards appears to be illegal. 2 *Rol.* 201. l. 23.

[Allowance in *eyre* is not *conclusive* evidence against third persons; the true way of pleading it is to allege immemorial usage, and to produce also the allowance in *B. R.* or in *eyre*. *Biddulph v. Ather*, T. 28 & 29 G. 2. 2 *Wilf.* 23.]

An antient charter, if the words are general or obscure, shall be construed according to antient allowance. 2 *Inst.* 282. 9 *Co.* 28. a.

Or, according to the import of the words when the charter was made, and subsequent usage. 2 *Inst.* 282.

If a charter of liberties pleaded before justices in *eyre*, or of the forest, be delayed to be allowed; a writ lies *de libertatibus allocandis*. *F. N. B.* 229. B.

And it may be sued by a corporation, or by a single person. *F. N. B.* 230.

By the *statutes* 3 (or 3 & 4) *Ed.* 6. 4. and 13 *El.* 6. if a charter be lost, shewing an exemplification or *constat* of the roll, is sufficient. *Inst.* 282.

But if the charter be within time of memory, there needs no confirmation, or allowance. 9 *Co.* 28. a.

So, a thing which may be claimed by prescription needs not any confirmation, or allowance. *Cort.* 2 *Inst.* 281. *Acc.* 9 *Co.* 28. a. *Strata Marc. Kit.* 30. b.

## (D) County Palatine.

### (D 1.) What shall be.

**T**HE highest franchise is a county palatine.

A county palatine is so called a *palatio regis*, because the count has *jura regalia* within his county as fully as the king himself, from whom all justice, honour, dignity, franchises, and privileges were at first derived. 4 *Inst.* 204. *Dav.* 60.

And the county is made a county palatine; not the person, a count palatine. 4 *Inst.* 205.

It may be by prescription, or by parliament.

So, the king may create a county palatine. *Dav.* 61.

In *England*, *Chesler*, *Durham*, and *Lancaster*, are counties palatine. *Dav.* 61. b. Of which *vide post.* (D 3, 4, 5, 6, 7.)

In *Ireland* three counties palatine were created *temp. H. 2.* (1.) The province of *Leinster*, granted to earl *Strongbow*, which afterwards descended to five daughters, who, upon petition, had each a county by itself, which was a county palatine. *Dav.* 61. b. (2.) The province of *Meth.* (3.) The province of *Ulster.* *Dav.* 61. b.

### (D 2.) The Dignity.

The authority of him, who had a county palatine, was as full, as the authority of the king himself, within his county palatine. 4 *Inst.* 205.

And



And consisted in a royal seigniory, and royal jurisdiction. *Dav.* 62. a.

In a county palatine, the justices in eyre, of assise, of gaol-delivery, of the peace, &c. were made by commission under seal of the count palatine, 4 *Inst.* 205. till by the *st.* 27 *H.* 8. 24. the power was resumed, and recontinued to the king.

All original and judicial writs, and all indictments there for treason or felony, were in his name, till the *st.* 27 *H.* 8. 24. enacted, that they should be in the name of the king, and teste'd in the name of the count. 4 *Inst.* 205.

And, till the same statute, an indictment ought to be *contra pacem* of the count, and now *contra pacem regis.* 4 *Inst.* 205.

So, till the same statute, the count palatine might pardon treason, felony, &c. *Ibid.*

So, the count palatine might make a tenure *in capite*, by grand serjeanty, &c. *Dav.* 62. b.

And barons within the county. 4 *Inst.* 211. *Dav.* 62. b.

### (D 3.) The County Palatine of Lancaster.

The county palatine of *Lancaster* was erected by act of parliament 50 *Ed.* 3. and granted to *John* duke of *Lancaster*, his son, for life; *Et quod habeat cancellariam suam, ac brevia sua sub sigillo suo, deputando justiciarios suos tam ad placita coronæ, quam alia placita quæcunque ad communem legem; ac cognitionem, et executionem, &c. per brevia et ministros suos faciend.; et quæcunque al. libertates ac jura regalia ad comitatum palatinum pertinent., adeo liberi sicut comes Cestræ, &c.* 4 *Inst.* 204. *Dav.* 62. 1 *Vent.* 157.

And therefore, the king shall have the same prerogative, where he is seised in right of the duchy of *Lancaster*, as where he is seised in right of the crown. *Cro. El.* 240.

But king *H.* 4. by charter in parliament directed, that all possessions of the duchy should remain as before. *Pl. Com.* 214.

And by the *st.* 1 *Ed.* 4. all possessions, which king *H.* 6. had the 3d of *March* preceding, are vested in and annexed to the crown, as forfeited for high treason, and by the same act are created to be the duchy of *Lancaster*, and the county of *Lancaster* is made a county palatine, and parcel of the said duchy; and the king shall have a seal, chancellor, and other officers for the county palatine, and others for the duchy, and they shall be managed separately from other possessions of the king. *Pl. Com.* 219.

By the *st.* 27 *H.* 8. 11. *f.* 6. all leases of the king's manors, lands, &c. in the county palatine of *Lancaster*, or of the duchy of *Lancaster* out of the county palatine, &c. shall pass under the seals of the duchy of *Lancaster*, or of the county palatine, as heretofore used. *Vide Patent, (C 4.)*

So, by the *st.* 27 *H.* 8. 24. *f.* 5. justices of assise, gaol-delivery, and peace, made by the king in the county palatine of *Lancaster*, shall be by commission under the king's usual seal of *Lancaster*.

By the *st.* 37 *H.* 8. 19. fines of lands in the county palatine of *Lancaster*, before justices of assise at *Lancaster*, shall be of equal force as fines in *C. B.*

And fines and recoveries ought to be levied there, of lands within the county palatine, and not at *Westminster.* 4 *Inst.* 205.

And

And therefore, justices of assize, gaol-delivery, and the peace, are always assigned by the king for the county palatine of *Lancaster*, by commission under the seal of the county palatine. 4 *Inst.* 205.

[*Testatum capias* is the process to be served on defendant, and not the chancellor's mandate. *Barnes*, 406.]

[By *st.* 22 *G.* 2. c. 46. *mesne* process in any suit in court of session of *Chester*, or *Common Pleas* of *Lancaster*, bearing *teste* in the preceding sessions, may be made returnable on the first *Wednesday* of any month, in each of the two vacations betwixt the sessions, or on the first day of sessions, and on those returnable in vacation in bailable actions, defendant shall put in special bail in eight days after the return, or sheriff shall assign bail-bond; and on service of copy, defendant shall appear in eight days after return, or plaintiff may enter appearance, and proceed; and all such writs may be proceeded on as if they had been returnable at the preceding sessions.]

So, the king has a court of equity, for matters of equity arising within the county palatine of *Lancaster*. 2 *Lev.* 24. And this was allowed by the *st.* 50 *Ed.* 3.

So, the duchy-court at *Westminster* may examine matters of equity arising out of the county palatine of *Lancaster*, within the duchy of *Lancaster*. 2 *Lev.* 24.

So, by usage, since the time of *H.* 5. for matters of equity in the county palatine of *Lancaster*. *Semb.* 2 *Lev.* 24.

The process in the duchy-court, shall be by privy-seal, attachment, &c. as in *Chancery*. 4 *Inst.* 406.

The officers there are the chancellor, attorney, receiver-general, clerk, auditors, surveyors, messenger. 4 *Inst.* 206.

[By *st.* 17 *G.* 2. c. 7. the chancellor of the duchy may appoint commissioners to take affidavits to be used in the courts of the county palatine.]

And four council assistants and council to the court, 4 *Inst.* 206.

But lands held of the duchy are not, without more, within the county palatine. *Semb.* *Skin.* 43.

#### (D 4.) The County Palatine of *Chester*.

The county palatine of *Chester* is by prescription. 4 *Inst.* 211. *Dav.* 62. 1 *Vent.* 157.

*Hugh Lupus* had the county of *Chester* granted to him by *William* the Conqueror, *tenendum sibi & heredibus ita libere ad gladium, sicut ipse rex tenebat Angliam ad coronam.* 4 *Inst.* 211.

By this general grant, he had *jura regalia*, and a county palatine. 4 *Inst.* 211.

And the city of *Chester*, tho' a county of itself, is part of the county palatine. 4 *Inst.* 212.

But the bishopric of *Chester* was held of the king, and the possessions not within the grant. 4 *Inst.* 211.

(D 5.) *The chamberlain.*] In the county palatine of *Chester*, the chamberlain of *Chester* has a court of equity held at the *Exchequer* there; and he is in the nature of a chancellor. 4 *Inst.* 211, 212.

Also he shall be a judge of matters at common law in the same county, as in the *Chancery* at *Westminster*. 4 *Inst.* 211.

And

And he has a deputy, called the vice-chamberlain. 4 *Inst.* 211.

And all procefs to the county palatine shall be directed to the chamberlain, commanding him, that he command the sheriff to execute it. 2 *Lev.* 111.

If an information be for a fact in the county of the city, there shall be a *mittimus* to the chamberlain, commanding that he send it to the mayor, and after trial take it back, and remit it to the court. 2 *Mod. Ca.* 328.

(D 6.) *The chief justice.*] So, within the county palatine of *Chester*, the chief justice of *Chester* has jurisdiction of all pleas of the crown, and common pleas. 4 *Inst.* 211.

So, before him, fines and recoveries may be suffered. 4 *Inst.* 211.

And by the *st.* 2 & 3 *Ed.* 6. 28. a fine before him, being proclaimed three several days, at three several sessions, shall be of the same effect as a fine at *Westminster*.

If error be of a fine in *Chester*, it shall be directed to the chief justice, *vel ejus locum tenenti*, and not to the chamberlain. *Dy.* 320. *b.*

So, records of the courts of *Westminster*, for trial there, shall be transmitted to the justices of assize, not to the chamberlain. *R.* 2 *Lev.* 111.

So, error to reverse judgments in *Chester*, shall be in a special manner. *Dy.* 345. *b.* 4 *Inst.* 214.

But this does not extend to error in fact. *Ibid.*

Nor, to error upon a fine. 4 *Inst.* 214.

Or, to reverse an outlawry. *R. Sal.* 500.

By the *st.* 1 *H.* 4. 18. if a person of the county of *Chester* commit felony, battery, or other trespass out of that county, and then flee into *Chester* procefs shall go to the *exigend*, in the county where the offence was done, and then the outlawry shall be certified to the officers of the county of *Chester*, and the offender, and his lands there seized for the lord of *Chester*, saving to the king, year, day, and waste; and his lands elsewhere shall remain in the king.

So, by the *st.* 43 *El.* 15. a fine of lands in the county of the city of *Chester*, may be levied before the mayor of *Chester*, in the same manner as before the high justice of *Chester*; but error thereon lies before the chief justice of *Chester*.

And by the same *stat.* he may issue a *dedimus potestatem* to take fines or to make attornies in a common recovery.

[By *st.* 12 *G.* 3. *c.* 30. additional salaries are granted, 300*l.* per annum to the chief justice, and 200*l.* to the second, and 200*l.* to each of the *Welfsh* judges.]

#### (D 7.) The County Palatine of *Durham*.

So, the county of *Durham*, being parcel of the bishopric of *Durham*, is a county palatine by prescription. 4 *Inst.* 216. *Dav.* 62. *b.*

And has its *Chancery*, and justices. *Dav.* 62. *b.* 1 *Bul.* 160.

By the *st.* 27 *H.* 8. 24. *f.* 21. the bishop of *Durham*, and his chancellor, shall be justices of peace in the county palatine of *Durham*.

So, he has *jura regalia*, by prescription, in all places between *Tine* and *Teeffe*. 1 *Rol.* 399.

And he shall have the escheat of his tenant for treason, if the estate be not entailed, where there is a forfeiture by the *st.* *H.* 8. 1 *Rol.* 400.

And



And he shall prescribe for the goods of felons, or of felons of themselves. *R. in a quo w.* 1 *Rel.* 399, 400. 2 *Bul.* 226.

And before the *ſt.* 27 *H.* 8. 24. he might pardon all treasons and felonies within his county. 1 *Bul.* 160.

And a recovery in *C. B.* for lands in the county of *Durham* shall be void. 1 *Bul.* 160.

So, it is sufficient to prescribe for franchises not granted, by saying, that it is a county palatine, and has *jura regalia*, & *ratione inde* he claims such franchises. *R.* 2 *Bul.* 226, 7.

[By *ſtat.* 4 *G.* 3. *c.* 21. the chancellor and justices of the court of pleas may appoint commissioners to take affidavits.]

(D 8.) *Ely*, &c.

*Ely* is called a county palatine by the *ſt.* 33 *H.* 8. 10. and the *ſt.* 5 *El.* 23.

The king 10 *H.* 1. erected the cathedral of *Ely* out of the monastery there, and the bishopric out of the abbey; and granted the county of *Cambridge*, before within the diocese of *Lincoln*, for his diocese. 4 *Inst.* 220.

To the bishop and his successors the king granted *jura regalia* within the isle of *Ely*; by which grant, and by prescription founded thereon, the bishop has a royal jurisdiction before his justice *de placitis corona*, & *de communibus placitis*. 4 *Inst.* 220.

But *Ely* is only a royal franchise, and not a county palatine. *Carth.* 109.

And therefore, if there be an action in a court of *Westminster*, for a matter arising there; the defendant cannot plead to the jurisdiction of the court: but the bishop may demand consuance of the plea. *R.* *Carth.* 109.

And an action there for lands in *Ely* is not void, as it would be in a county palatine. *Carth.* 109.

So, the county of *Pembroke* in *Wales* was a county palatine; but the jurisdiction is ousted by the *ſt.* 27 *H.* 8. 26. 4 *Inst.* 221.

So, *Hexham* was claimed by the archbishop of *York* as a county palatine; but 14 *El.* it was determined to be part, and within the same jurisdiction as the other part, of the county of *Northumberland*: 4 *Inst.* 222.

(D 9.) The Jurisdiction of a County Palatine.

A county palatine has jurisdiction of all pleas of lands and tenements lying within the county palatine, which ought to be determined there, and not elsewhere. *R.* 4 *Inst.* 212.

So, of contracts, and all matters and causes which arise within the county palatine. 4 *Inst.* 212.

And therefore, if real actions for land within a county palatine, are brought in the courts at *Westminster*, it may be pleaded to the jurisdiction of the court; except in error, foreign plea, or voucher. 4 *Inst.* 212. *Vide Abatement*, (D 2.)

So, in personal actions, if the matter be alleged within a county palatine. 4 *Inst.* 213.

In debt upon a bond, &c. which appears by the date to be made in a county palatine. *Sav.* 35.

[B. R.]

[*B. R.* will expect a return to a *latitat* into *Durham*, and will not determine as to jurisdiction on motion, but on claim of consuance or plea to the jurisdiction. *Chapman v. Maddison*, P. 11 G. 2. *Str.* 1089. *Andr.* 191.]

So, an inhabitant of a county palatine cannot be summoned out of it, except in case of treason, or error, by any writ or process. 4 *Inst.* 412.

So, process or writ used there ought to be under the seal of the county palatine. 4 *Inst.* 212.

So, an office, found upon a writ or commission for land there, if it be not out of the *Exchequer* there, shall be void. 4 *Inst.* 213.

If there be judgment in a real action for land which lies in a county palatine, it is void; tho' there was no plea to the jurisdiction; for the court takes notice of every county, and county palatine. 2 *Inst.* 557.

But a county palatine shall not have jurisdiction, where the judge himself is a party. 4 *Inst.* 213. *R.* 12 Co. 114. 1 *Rol.* 246.

So, a transitory action may be alleged out of a county palatine, and may be brought in a court of *Westminster*, tho' the cause of action arose within the county palatine. 4 *Inst.* 213. *R.* 12 Co. 114. *R.* 1 *Sid.* 309. *Sav.* 35.

Tho' the party also resides in the county palatine. *R.* 1 *Sid.* 103. *R.* 2 *Rol.* 318. l. 15.

So, if the party lives out of the county palatine, he may be sued for land or goods within it, at a court of *Westminster*. 4 *Inst.* 213. *R.* 12 Co. 114.

So, an ejectment may be in *B. R.* for lands there, when the defendant is in *custod.* *Mar. Dub.* 1 *Sid.* 168. *Ray.* 81. *Carth.* 12.

So, if the action alleges the fact in a county palatine, after a plea in bar, the defendant shall not have advantage of it. *R.* *Carth.* 11.

Nor, if the defendant demurs to the declaration. *R.* *Carth.* 355.

So, error lies in *B. R.* upon a judgment given in a county palatine. 4 *Inst.* 212. *Vide Pleader*, (3 B 3.)

So, if a suit be against *A.* who lives in a county palatine, by the executors of *B.* upon an obligation, in *C. B.*, upon which *A.* sues in the *Exchequer*, which is a court of equity, in *Chester*, where one executor dwells, the other in *London*; he cannot serve process upon him in *London*. *R.* *Hut.* 59.

So, a *fieri facias* lies to a county palatine, upon a judgment in *B. R.* against him who dwells there. *R.* 1 *Lev.* 256.

So, a suit in equity, in the duchy of *Lancaster*, ought to shew the lands in question to be within the jurisdiction. *Eq. Ca.* 95. (2d part of 2 *Mod. Ca.*)

[A *certiorari* from *B. R.* lies to remove proceedings from a county palatine in a civil action. But such a writ does not issue as of course; a special ground for it must be laid before the court. *Doug.* 751.]

[So, a writ of error lies from a county palatine, into *B. R.* *Ibid.* 752. in the notes.]

(E) The *Cinque-Ports*.

## (E 1.) What Privileges they have.

**T**HE franchise of the *Cinque-Ports* is claimed, in part by prescription, in part by act of parliament, and charter, and has been time out of mind, &c. 4 *Inst.* 223.

In the time of *Edward* the confessor there were but three ports, *Dover*, *Sandwich*, and *Romney*; but, in the time of *William* the Conqueror, *Hastings* and *Hithe*, were added; and 1<sup>o</sup> *Joh. Winchelsea*, and *Rye*; yet they are called the *Cinque-Ports*. 4 *Inst.* 222. 2 *Inst.* 556.

So, the king, by patent may make any town a member of the *Cinque-Ports*. *Hard.* 56.

The *Cinque-Ports* are part of the county of *Kent*; and tho' they have not *jura regalia*, yet they have many privileges, which were confirmed by the *st. M. Ch.* 9. 4 *Inst.* 223.

And therefore, have all jurisdiction in all actions, real, mixt, and personal, which arise within the *Cinque-Ports*. 4 *Inst.* 224.

If an action be brought in *B. R.*, &c. for a matter which arises there, it may be pleaded generally in abatement. *Vide Abatement*, (D 3.)

And error does not lie in *B. R.* or *C. B.* on a judgment given there. 2 *Inst.* 557.

But a judgment in *B. R.* or other court of the king, is good, if the privilege of the *Cinque-Ports* be not pleaded. 4 *Inst.* 223. 2 *Inst.* 557.

And such judgment does not destroy their privilege afterwards. 2 *Inst.* 557. 4 *Inst.* 223.

And *B. R.* cannot take notice judicially, what towns are within the *Cinque-Ports*. 2 *Inst.* 557.

So, prerogative-writs, as *habeas corpus*, *mandamus*, &c. run to the *Cinque-Ports*. *R.* 2 *Cro.* 543.

So, an appeal lies in *B. R.* for a murder in the *Cinque-Ports*. *R.* *Vel.* 13. *Cro. Car.* 247.

So, a *certiorari* lies to remove an indictment for felony in the *Cinque-Ports*. *R.* *Cro. Car.* 253. 264. 291.

## (E 2.) What Courts.

Within the *Cinque-Ports* there are several courts; a court before the mayor and jurats of each port; a court before the constable of the castle of *Dover*; and a court of the *Cinque-Ports* *apud Shepway*. 4 *Inst.* 223.

The court before the mayor and jurats is a court of record. 2 *Inst.* 557.

The court before the constable of the castle of *Dover* holds plea by bill, according to the course of the common law, of things which concern the guard of the castle. 2 *Inst.* 557. *F. N. B.* 240. *B.*

But by the *st. Art. super chart.* 7. no foreign plea of the county shall be pleaded, which does not touch the guard of the castle.

Nor shall the people of the *Cinque-Ports* be distrained to plead elsewhere, or in other manner than they ought, according to the antient charters or franchises affirmed by the great charter. 2 *Inst.* 556.

The court of the *Cinque-Ports* *apud Shepway* was created by letters patent



patent *temp. Ed. 1.* 4 *Inst.* 224. But must have been confirmed by parliament. 2 *Inst.* 557.

And an erroneous judgment before the mayor and jurats in any port, shall be redressed there. 4 *Inst.* 224. 2 *Inst.* 557. *R. Dy.* 376. *a.*

And that, by bill in the nature of a writ of error, without any writ. 2 *Inst.* 557.

And upon reversal, the mayor and jurats shall be fined, and the mayor removed from his office. 2 *Inst.* 557. *Dy.* 376. *a.*

(E 3.) How a Writ to the *Cinque-Ports* is directed.

A writ to the *Cinque-Ports* to remove a record of a judgment there, shall be directed to the constable of *Dover*, who is the immediate officer to *B. R.*, and he shall write to the barons to certify to him, and shall then send it to the court. 30 *H. 6. 6.* *Vide infra.*

But if an indictment be before them as justices of peace, or of *oyer* and *terminer*, a *certiorari* to remove it need not be to the warden of the *Cinque-Ports*; but to the mayor and jurats before whom it was taken. *R. Cro. Car.* 252. 264.

The warden of the *Cinque-Ports* is an officer, who has been appointed, time out of mind, &c. for the custody of the *Ports*. 4 *Inst.* 223.

And he has the jurisdiction of admiral within the *Cinque-Ports*, exempt from the admiralty of *England*. 4 *Inst.* 223. 2 *Inst.* 556. 2 *Jon.* 67. *Sir L. Jenk.* 1 vol. 85.

So, he shall be constable of the castle of *Dover*. 4 *Inst.* 223. 2 *Inst.* 556.

The constable of *Dover* and warden of the *Cinque-Ports* is the immediate officer to the king's courts, for all matters within the *Cinque-Ports*; and therefore, a writ shall be directed to him to certify a record there. 4 *Inst.* 223.

Tho' it be in another port; for he shall send for it to the barons of the *Cinque-Ports*, and transmit it to the king's court. 4 *Inst.* 223. *Vide supra.*

So, if a defendant, against whom judgment is in *B. R.*, &c. has no land but in the *Cinque-Ports*, there shall be a writ to the constable of *Dover*, to make execution. 4 *Inst.* 223. *R. 1 And.* 28. 3 *Leo.* 3.

If surety of peace be demanded in *Chancery*, against any within the *Cinque-Ports*, there shall be a writ to him, to take it. 4 *Inst.* 223.

## (F) Corporation.

(F 1.) What shall be.

**A** Corporation is a franchise created by the king.

A corporation is a body constituted by policy, with a capacity to take, or to do. *Co. L.* 250. *a.*

For by incorporation it acquires *jus personæ*, and becomes *persona politica*, and is capable of all civil rights *habendi & agendi*. *Per Att. Gen. Quo W.* 3. 8.

A corporation is ecclesiastical, or lay; and both are sole, or aggregate. *Co. L.* 250. *a.*

An ecclesiastical corporation sole is regular; as, an abbot, prior, &c. *Ibid.*

Or, secular; as, a bishop, dean, &c. *Co. L.* 250. *a.*

An ecclesiastical corporation aggregate consists of an head and body, who are all persons capable; as, a dean and chapter; or the head only is capable, and the others incapable in law; as, an abbot and his convent, &c.

So, a lay-corporation is sole; (as, the king; the chamberlain of London, &c.) 10 *Co.* 29. *b.* 4 *Co.* 65. *a.* *Cro. El.* 464.

Or, aggregate; as, a mayor and commonalty. 10 *Co.* 29. *b.*

(F 2.) How created.

(F 2.) *By the common law.*] A corporation is by the common law, by act of parliament, by prescription, or by charter. *Co. L.* 250. *a.*

By the common law; as, the king. 10 *Co.* 29. *b.*

(F 3.) *By parliament.*] So, a corporation may be created by act of parliament. 10 *Co.* 29. *b.*

[The constitution of a corporation as settled by act of parliament, cannot be varied by the acceptance of any charter inconsistent with it. *Rex v. Miller, E.* 35 *Geo.* 3. 6 *T. R.* 268.]

[By *stat.* 18 *G.* 2. *c.* 15. the surgeons and the barbers of London were made two separate and distinct corporations.]

[But the *stat.* 32 *H.* 8. *c.* 42. continues in force as to the barbers. *Sharp v. Law, M.* 7 *G.* 3. 4 *B. M.* 2133.]

(F 4.) *By prescription.*] So, an antient city or borough may claim to be a corporation by prescription. 10 *Co.* 29. *b.*

A corporation by prescription may prescribe by several names. *Per Hale, Hard.* 504.

(F 5.) *By charter. Who may make it.*] To a corporation by charter there are requisite; 1. an authority to make it; 2. sufficient words; 3. persons to be incorporated; 4. a name; 5. a place. *R.* 10 *Co.* 29. *b.*

The king alone has authority to make a corporation by his charter. 10 *Co.* 33. *b.* 1 *Rel.* 512. *l.* 27. *Per Att. Gen. Quo W.* 8.

And therefore, a prescription by a subject, or a corporation, to make another corporation, is void. *Bro. Corporation,* 45. 1 *Rel.* 512. *l.* 35.

So, if the king grants power to another to make a corporation, it is void, except when it may commence upon the charter, or grant of the king, and not by the power conferred upon the other by such grant. 49 *Aff.* 8. *Dub. Bro. Corporation,* 45. *Th. D. lib.* 1. *c.* 22. *f.* 26. *acc.* 10 *Co.* 33. *b.*

So, the pope, tho' he usurped very great authority, never could make a corporation. *Jon.* 184. *Bro. Corporation,* 34.

So, the corporation of London, tho' its privileges are confirmed by parliament, cannot make another corporation. 1 *Sal.* 192.

But a subject may chuse the persons, invent the name, &c. for the king. 1 *Rel.* 512. *l.* 30.

So, a corporation may make a fraternity, or company, within themselves. 1 *Sal.* 192.

So, the king, by charter to the *East India Company*, &c. may enable them to constitute such persons who shall be incorporated.

[The

[The king, by letters patent may enlarge the boundaries of a city.  
*Rex v. inhab. civ. Norwici, P. 5 G. Str. 177.*]

(F 6.) *By what words.*] There need not any precise words to make a corporation. *R. 10 Co. 30. b.*

And therefore, if the words, *fundo, erigo, stabilio*, &c. be wanting, it is not material. *10 Co. 28. a. 1 Rol. 513. l. 7.*

Antiently if the king had granted to a vill *Gildam Mercatoriam*, it was, by such grant, incorporated. *1 Rol. 513. l. 10. 10 Co. 30. a. Sutton's Hosp.*

So, if the king grants to a vill to be quit of toll, it is incorporated for this purpose. *1 Rol. 513. l. 22.*

Or, if he grants lands to them, they have thereby a corporate capacity to take, if a rent be reserved. *1 Rol. 513. l. 40. Adm. Cro. El. 35.*

Or, if he gives licence to grant lands to them. *1 Rol. 513. l. 13.*

Yet a grant of land to a vill, does not give capacity to take, if a rent be not reserved; for the grant shall be void. *1 Rol. 513. l. 20.*

And a grant of land, rendering rent, does not give a capacity to alien the same land. *R. Cro. El. 35.*

(F 7.) *What persons.*] A corporation may be constituted of persons natural, or political. *10 Co. 29. b.*

It may be composed out of another corporation. *1 Rol. 512. C.* if the other be a corporation by prescription. *1 Sid. 291.*

So, a corporation aggregate may be made without a head. *Bro. Corporation, 43. R. 10 Co. 30. b.*

(F 8.) *Place.*] A corporation ought to be constituted of some place. *10 Co. 123.*

And tho' the place be not in reality in *England*, it ought to be mentioned as in *England*; as, the corporation of *St. John of Jerusalem* in *England*. *10 Co. 32. b. 1 Rol. 512. D.*

So, if it be named of any place, it is sufficient, tho' it has not any lands or possessions there. *Jon. 168.*

(F 9.) *Name.*] A corporation ought to have a name; which is in the nature of a name given to a natural person by baptism. *10 Co. 29. b. Vide Capacity, (B 5.)*

But the name of an *intended hospital*, is sufficient. *10 Co. 32.*

So, if the name be implied by the charter, it is sufficient, tho' no name be given by express words; as, if the king incorporates the inhabitants of *D.* with power to chuse a mayor; the name of *mayor and commonalty* will be sufficiently expressed. *Per Holt, 1 Sal. 191.*

So, a corporation by prescription may have different names. *Per Hale, Hard. 504.*

And in pleading, shall say, that it was known as well by the one name, as the other. *Lut. 1498.*

So, by charter, a corporation may be incorporated by one name, and afterwards by another.

And after the change of name, the last ought to be used. *1 Rol. 512. l. 55.*

So, a change of name, or new charter, does not merge the antient privileges.



privileges. *R. Mo.* 581, 2. *R. 4 Co.* 87. *b. R. 1 Sand.* 344. *R. Ray.* 439. *Bro. Corporation,* 38.

And therefore, it shall retain the possessions which it had before.

1 *Rol.* 513. *l. 2.*

Shall recover a debt, &c. due before. 3 *Lev.* 237.

So, it shall be subject to obligations, annuities, &c. as before. *Bro. Corporation,* 3. 61.

But they ought to prescribe by their antient name till such a day, and shew how it was then changed; and not by their last name. *Hard.* 504. *Lut.* 1498.

(F 10.) What Things are incident to a Corporation.

A corporation being erected, it has as incident, without words in the charter, power to purchase, and alien. 10 *Co.* 30. 1 *Rol.* 513. *l. 35.*

To plead, and be impleaded. 10 *Co.* 30. *b. 1 Rol.* 513. *l. 35.*

To make a common seal. 10 *Co.* 30. *b.*

To chuse members in the place of others dead, or removed. *R. 1 Rol.* 514. *l. 5. D. Ca. Parl.* 45.

To take a resignation of any member. *Cont.* 12 *Jac. R. acc.* 15 *Jac.* 2 *Rol.* 456. *l. 10. Per Hale,* 1 *Sid.* 14. *Acc.* 11 *W.* 3. in *B. R. Sal.* 433. upon a return of a *mandamus* to the mayor of *Rippon.*

So, it has a power as incident, to make bye laws. 10 *Co.* 31. *a. Per Holt,* *T.* 11 *W.* 3.

[When the mode of electing the officers of a corporation is not regulated by charter or prescription, the corporation may make bye-laws to regulate it. 3 *T. R.* 189.]

[A corporation created by *letters patent*, with a power of making bye-laws, cannot make any laws to incur a forfeiture. 1 *T. R.* 118.]

[Neither can a corporation created by act of parliament, unless such a power be expressly given. *Ibid.*]

(F 11.) What it may do.

A corporation may purchase, and take in succession. *Co. L.* 2. 250. *a. Vide post.* (F 15, 16, 17.)

Or, make an alienation, under the common seal, in fee, for life, or for years. 1 *Sid.* 162. *Vide post.* (F 18.)

So, an act by the major part, corporately assembled, is the act of the whole corporation. *Per Att. Gen. Quo W.* 32. *R. Dav.* 47, 48. *Ca. Parl.* 29.

If assembled in a convenient place; tho' not in the chapter-house, &c. *R. Dav.* 48.

By the *st.* 33 *H.* 8. 27. by the common law, all assents, elections, grants, and leases by the dean, &c. or other governor of a cathedral, hospital, college, or corporation, with the assent of the greater part of the chapter, fellows, &c. are as good as if all had agreed; and all orders, statutes, &c. by the founder, &c. that such assent, election, &c. should be hindred by one, or more, being the lesser number of such corporation, made, or to be made; and oath for the observance, &c. shall be void.

So, a bye-law for the public good, made by the major part, binds all. *R. 5 Co.* 63.

But the major part ought to give their votes *distinctè*, and not by proxy. *R. Dav.* 47, 48.

So, if the statutes of a college, &c. require a licence for absence to be by the wardens, three bursters, five deans, and five senior fellows, the major part is not sufficient, but it ought to be by all; for it is not within the *fl.* 33 *H.* 8. 27. which extends only to acts that concern the whole corporation. *R. Dy.* 247.

So, where a bye-law is not good without a custom, the major part does not bind, if it be not warranted by the same custom. *5 Co.* 63.

(F 12.) How act.

(F 12.) *By attorney.*] A corporation aggregate can do nothing but by attorney. *Co. L.* 66. *b.*

It ought to appear by attorney; for if all appear in person, it is not sufficient. *Bro. Corporation,* 28. *Vide post.* (F 19.)

It ought to acknowledge a deed, or levy a fine, by attorney. *1 Leo.* 184. *Mo.* 591.

Any natural person may be an attorney for a corporation.

Tho' he be a member of the same corporation. *Bro. Corporation,* 4.

A corporation may make a lease, and seal it, and afterwards make a letter of attorney to enter, and deliver the lease. *R. 2 Lev.* 97. *R. 1 Vent.* 257.

So, if there be an uncertainty of place; as, if a corporation purchases a carve in such a waft, there shall be first an election of the place, with the abuttals, and afterwards a letter of attorney for entry thereon. *1 Leo.* 30.

If it makes an attorney to collect its rents, and to enter; if it would avoid a lease for non-payment afterwards, it ought to make an attorney to enter, *de novo.* *Per Holt, Skin.* 413.

So, a corporation may acknowledge a deed before a judge, in the chapter-house, without attorney. *R. Mo.* 676.

Or, put the common seal to a deed. *Mo.* 676.

So, a corporation, with its head, may give a personal command without attorney.

(F 13.) *By deed.*] So, a corporation aggregate can do nothing but by deed under the common seal. *Bro. Corp.* 34.

As, it cannot make a feoffment, or demise, or give a licence. *Bro. Corp.* 50, 51. *1 Vent.* 48.

Nor, enter for a forfeiture, or into lands purchased. *R. 1 Rol.* 514. *K. Bro. Corp.* 50. *cont.* 96. *1 Leo.* 30. *2 Cro.* 110. *1 Vent.* 48.

Nor, present to a benefice. *Bro. Corp.* 34. 83.

So, it cannot be a disseisor, or trespasser, without an agreement by deed. *Bro. Corp.* 48. 50.

Nor, authorise one to appear as its bailiff in an assise. *1 Vent.* 48.

But a corporation, which has a head, may give a personal command and do small acts, without deed: as, it may retain a servant, a cook, butler, &c. *Dub. Bro. Corp.* 47. *acc.* 49, 50, 56. *1 Vent.* 47.

It may authorise another to drive cattle, kindle a fire, &c. *Bro. Corp.* 50. *Adm.* *1 Vent.* 47. *2 Sand.* 305.

To make a distress; for this does not vest, or divest any interest. *1 Sal.* 191.

And therefore, any one may justify such an act, without shewing an authority by deed.

So, he may justify as their servant to remove cattle out of their land, without deed. *R. Luti* 1497.

So, they may do an act upon record, without their common seal; for they are estopped by the record. *1 Sal.* 192.

So, a corporation aggregate may do small acts. *1 Sal.* 191.

(F 14.) What it cannot do.

But a corporation cannot do a personal act, which requires knowledge; as, homage, or fealty. *Co. L.* 66. *b.*

Nor, be bound in a statute, or recognizance. *Per Dyer, Mo.* 68. *Dal.* 69.

Nor, wage law.

So, it cannot commit treason, or felony.

Nor, shall it be excommunicated; for it has no conscience.

(F 15.) Purchase by a Corporation.

(F 15.) *What good.*] A corporation has an incident power to purchase lands, or goods. *Co. L.* 2. *a.* 10 *Co.* 30. *b.* *R.* 1 *Rol.* 513. *l.* 35.

And may take goods in succession, without a licence in *mortmain*.

So, lands and tenements, with a licence.

(F 16.) *When it goes in succession.*] If a feoffment, grant, &c. be made to a corporation aggregate, which consists of persons all capable, it will give a fee to them without the word, *successors*. *Co. L.* 9. *b.* 94. *b.* *D.* 27 *H.* 8. 15. *a.*

So, if the head only is capable; as, to a prior and convent, &c. where it is given in *frankalmoine*. *Co. L.* 9. *b.* 94. *b.*

So, a lease to a corporation aggregate, &c.; as, to a mayor and commonalty, tho' limited for life, shall be good for ever; for the words, *for life*, shall be rejected. 27 *H.* 8. 15. *a.*

So, goods and chattels granted to them go in succession. *Dy.* 48. *a.* 4 *Co.* 65. *a.*

So, an obligation, &c. made to them; tho' it says nothing of successors. 27 *H.* 8. 15. *a.*

So, if a master of an hospital recovers arrears of an annuity, and dies; they go to the hospital, not to the executor of the master. 1 *Rol.* 515. *l.* 10.

If the president of the college of physicians recovers in debt for mal-practices; the successor, and not his executor, shall have a *scire facias*. *R.* 1 *Rol.* 515. *l.* 20.

So, by special custom, a corporation sole may take goods, &c. in succession; as, the chamberlain of *London*. *R. Cro. El.* 464. *R.* 4 *Co.* 65. *n.* *Fulwood*.

But a feoffment, grant, &c. to a corporation sole will not give a fee in succession, unless it be limited to him and his successors, *Co. L.* 94. *b.*

Nor, to a corporation aggregate, where the head alone is capable; as, to an abbot and convent, &c. without the word *frankalmoine*. *Co. L.* 94. *b.*

So, regularly, no chattel in possession or action, granted or made to a corporation sole, goes in succession, but to his executor; tho' it be granted,



granted, &c. to him and his successors. *Dy. 48. a. R. 4 Co. 65. a. 1 Rol. 515. l. 5. 15.*

As, an obligation, term for years, &c. *4 Co. 65. a. Vide Biers (C).*

(F 17.) *What not good.*] But a corporation, sole or aggregate, ecclesiastical or lay, cannot purchase or take lands and tenements, without licence to take in *mortmain*. *Vide Capacity, (B 2, 3.) Vide Co. L. 2. b. 2 Inst. 75.*

So, a feoffment, grant, &c. which takes effect when a corporation aggregate wants a head; as, to a mayor and commonalty, &c. in a vacation when there is no mayor, shall be void. *Co. L. 264. a. 13 Ed. 4. 8. b.*

A devise to a college by the master is void; for it has not an head when the devise takes effect. *R. 4 Leo. 223.*

But if there be an head when the grant takes effect, it is sufficient; tho' there was none when the grant was made; as, a lease to *A.* for life, remainder to a mayor and commonalty, made in a vacation, shall be a good remainder, if there be a mayor when *A.* dies. *Co. L. 264. a.*

So, a grant of liberties, or franchises, in the time of vacation, shall be good; as a grant to a commonalty, to be incorporated by the name of mayor and bailiffs, and to chuse a mayor. *10 Co. 27. b.*

So, payment of rent may be made to a chapter in a vacation. *Mo. 52.*

So, a licence by the king to grant to a chaplain, &c. is good, tho' no chaplain is then *in esse*. *10 Co. 27.*

So, in pleading, there is no need to allege the life of the mayor at the time of the grant. *Bro. Corp. 58. 13 Ed. 4. 8. b.*

#### (F 18.) Alienation by a Corporation.

So, a corporation has an incident power to make an alienation of their lands or goods. *Vide 1 Sid. 162.*

And tho' they alien all their goods and possessions, yet the corporation continues. *Jon. 168.*

But an alienation of the head, without the body, is a *disseisin*. *Co. L. 341. b.*

A fine and non-claim bars a corporation which has an absolute fee. *R. Pl. Com. 537, 8.*

But a successor of a bishop, dean, &c. who have not an absolute estate, shall have other five years. *Pl. Com. 538.*

#### (F 19.) Corporation may sue, or be sued.

So, a corporation has an incident power to sue, or be sued.

And therefore, may maintain a writ of right, or other real action, for their tenements. *F. N. B. 5. C. Pl. Com. 537.*

A mayor and commonalty may have an action of covenant upon a grant for the benefit of their members. *1 Sand. 344.*

And trespass for the imprisonment of the mayor. *Per Brian, 21 Ed. 4. 14. b.*

And an action upon the case for a disturbance in holding their leet, or taking the profits of liberties granted to the corporation. *45 Ed. 3. 4. b. 18 H. 6. 11. b.*

But

But the mayor and commonalty shall not have an action upon a bond made to the mayor himself by his own proper name. *Per Vassor*, 21 Ed. 4. 15. Dy. 48.

Tho' another be afterwards made mayor. 21 Ed. 4. 15.

[If a bond is made to Dr. A., (who is the master,) fellows and scholars of a college, *solvendum* to the master, fellows, and scholars; it is a bond to them in their corporate capacity. *Sidney Suffex Col. v. Davenport*, H. 21 G. 2. 1 Wilf. 184.]

[If there is judgment of ouster against the mayor and aldermen, and they all die, and a new charter is given, the corporation is so revived that they are liable to the debts, and entitled to the credits of the old, and may sue in their new name on a bond given before the judgment. *Borough of Colchester v. Seaber*, P. 6 G. 3. 3 B. M. 1866. 1 El. Rep. 591.]

So, the commonalty cannot sue an action alone, if there be a mayor, or a bailiff.

Otherwise, if there be no mayor, or bailiff. *Dub. Th. Dig. l. 1. c. 22. f. 13. 16.*

The process against a mayor and commonalty is distress. 45 Ed. 3. 3. a. 2 Ver. 396.

[Corporation must be sued by *pone* and *distingas*; yet if they appear to *capias*, it cures it. *Barnes*, 415.]

[Proceedings in *Chancery* against a corporation for a contempt, cannot lie against the offending parties *personally*, but must be by sequestration of their estate and effects. *Cowp.* 377.]

And in *Chancery*, if they have not whereby they may be distrained, upon petition to the lords in parliament it may be ordered, that if they do not appear upon the issuing of process and *distingas* there, the bill shall be taken *pro confesso*. *Ca. Ch.* 205.

If the sheriff upon a *distingas* does not compel an appearance, the court will oblige him to return larger issues. 1 Sal. 191.

But process of outlawry does not lie against a corporation aggregate. 45 Ed. 3. 2, 3.

And therefore, trespass does not lie against a corporation, but against the particular persons only; for a *capias* and exigent do not go against a corporation. *Bro. Corp.* 43. *Qu. Th. Dig. l. 4. c. 13. f. 3. 7.*

Nor, a *subpœna*; for it has no conscience. *D. 2 Bul.* 233.

At the return of the process it is not sufficient, if the particular persons distrained appear. *Bro. Corp.* 28.

Or, if all the members of the corporation appear in person. *Bro. Corp.* 28.

But the corporation must appear by attorney, made under their common seal, by the name of the corporation. *Bro. Corp.* 28. *Vide ante*, (F 12.)

For the pleadings in actions by and against a corporation, *vide Pleader*, (2 B 1, 2.)

#### (F 20.) The Members of a Corporation.

(F 20.) *How chosen. The election, when good.*] So, a corporation has an incident power to chuse new members; as, a mayor, or bailiffs,

liffs, aldermen, &c. tho' no power be given by the charter. *Dub. 12 Co. 121. Acc. per. two J. 1 Rol. 514. l. 5. D. Ca. Parl. 45.*

And therefore, an affirmative authority by charter does not take away the incident power to chuse; as, if a charter says, *that after death, removal, &c. they may chuse another within eight days*; if the election be not within eight days they may chuse afterwards. *R. per two J. 1 Rol. 514. l. 5.*

If the charter says, *the mayor shall summon a court, &c.* and he refuses, it may be done without him. *Semb. 3 Mod. 13.*

So, tho' the charter says, *the commonalty shall chuse*, which import all the commons; yet an election by the major part is good. *R. 1 Rol. 514. l. 10. [Vide ante, ff. 33 H. 8. 27. (F 11.)]*

[Where the power of doing corporate acts is not specially delegated to a particular number, the general mode is for the members to meet on the charter days, and the major part of those who are present do the act. *Cowp. 250. Vide Cowp. 538.*]

And by usage, a select number, called the common council, shall chuse; for there shall be intended an antient ordinance for it. *R. 4 Co. 77.*

[The number of electors may be restrained by a bye-law, but it cannot strike off an integral part of them, nor narrow the number of the eligible. *Rex v. Spencer, H. 6 G. 3. 3 B. M. 1827.*]

If the charter says, *the commonalty shall chuse*, and by a subsequent charter, *the mayor and aldermen*; an usage to chuse according to the new charter, is good; for it is evidence of the consent of the corporation to take it as a grant of a new privilege, and not as a confirmation of the former. *R. per two J. Eyre cont. 1 Sal. 168.*

[If a charter, reciting that, by a former charter, the mayor, jurats, and commonalty might elect, &c. whereas in truth it should have recited, that the mayor and jurats (without commonalty) might elect, &c. grants, therefore it shall and may be lawful for the mayor, jurats, and commonalty to elect, &c.; this operates as a new grant, and the right of election is in mayor, jurats, and commonalty. *Rex v. Blunt, M. 12 G. 2. Andr. 293.*]

[If one charter directs the mayor and jurats to chuse jurats out of the freemen, and a subsequent charter directs the mayor, jurats, and commonalty to chuse them out of the inhabitants, they cannot subsist together; the last only is good. *Rex v. Massory, M. 12 G. 2. Andr. 295.*]

So, if the charter says, the burgesses shall chuse a mayor *de seipsis*; by antient constitutions and usage, the election of one, out of two whom the common council shall propose, shall be good. *R. 1 Sal. 190.*

[If the assembly is duly summoned, the election cannot be stopt by protest; therefore if the minority vote for *A.* the only candidate named, and the majority do not vote, but protest against any election at that time, *A.* is duly elected. *Oldknow v. Wainwright, T. 33 & 34 G. 2. 2 B. M. 1017.*]

[If the bailiff and burgesses are empowered to appoint a school-master, and to make laws, &c. tho' they cannot delegate their authority, they may make a regulation, that another (as a college, &c.) shall name a proper person whom they will appoint, with power reserved to themselves to approve or disapprove. *Attorney-General v. Shrewsbury, P. 1726, Bunb. 215.*]

[If



[If twelve are incorporated by name to chuse a chaplain for K., and by another clause three of the twelve are to chuse a chaplain for S., with consent of the major part of the inhabitants of S., and two of the three chuse, it is good, though the third dissent. *Attorney-General v. Davy*, T. 1741, 2 *Atkyns*, 212.]

[If members are to be elected by the *residue*, and there is only one elector remaining, *he* may elect. *Rex v. Richardson*, P. 31 G. 2. 1 B. M. 517.]

[A charter, directing an election to be made by the remaining members of a definite body of a corporation, is good in law. *Rex v. Hoyte*, B. R. M. 36 Geo. 3. 6 T. R. 430.]

[In a præscriptive corporation, an usage to this effect is evidence of such a charter. *Ibid.*]

[Consequently, in either case, a person is well elected by a majority of the subsisting members, as distinguished from a majority of the full body. *Ibid.*]

[If there are by charter two bailiffs, two aldermen, and twenty-five capital burgesses, and on vacancy the bailiffs, aldermen, and capital burgesses, or the major part of them, *quotum unum ballivorum & unum aldermannorum duos esse volumus*, to elect another; their presence only, and not their consent, is necessary. *Salisbury Cotton v. Davies*, E. 3 G. Str. 53.]

[If the right of election is in freemen occupying houses of 10 l. yearly value, a person occupying such a house does not lose his vote by letting one part of the house in lodgings, so as to reduce his rent to be under 10 l. *Fludier v. Lombe*, T. 9 G. 2. B. R. H. 307. the value, and not the rent, is the qualification. *Rex v. Lisle*, P. 11 G. 2. Str. 1090. *Andr.* 163.]

[A lodger is an inmate, and not an occupier, and the house, not any part of it, can be properly said to be in the tenure or occupation of a lodger. *Ibid.*]

[Officers who ought to be annually elected, yet are good, after the year is out, till others are elected and sworn. *Foot v. Prouse*, P. 11 G. Str. 625.]

[A bare swearing in and acting does not make a man an officer *de facto*; and unless there is some form of election, he is a mere usurper. *Rex v. Lisle*, P. 11 G. 2. Str. 1090. *Andr.* 163.]

[By *stat.* 12 G. 3. c. 21. the mayor, &c. on demand of two freemen, &c. must permit them or their agents to inspect admissions, and take copies, on pain of 100 l.]

(F 21.) *When not.*] But, regularly, the election ought to be conformable to the charter; and therefore, if the charter says, *the mayor and aldermen shall chuse*, an election by the aldermen, without the presence of the mayor, or his deputy, is bad. R. 1 Rol. 514. l. 20.

[If the right of election is in the mayor, jurats, and commonalty, it cannot be restrained by a bye-law made by the mayor, jurats, and common-council, to such of the commonalty as have served churchwarden and overseer. *Rex v. Spencer*, H. 6 G. 3. 3 B. M. 1827.]

[Usage is not sufficient, in a corporation by charter, to support an election made otherwise than according to the charter; as, where the charter directs election by the commonalty, and it is done by a select number,

number, there must be a bye-law, and the court will not determine that on motion. *Rex v. Tomlyn*, M. 10 G. 2. B. R. H. 316.]

[If the charter says, the mayor shall be chosen by the capital burgesses out of the capital burgesses, who are twenty-four; and the usage has been for them to chuse out of five put in nomination by the common burgesses, and they meet and put eight in nomination, out of whom the capital burgesses elect, it is bad. *Barber v. Bolton*, T. 6 G. Str. 314.]

[If two bailiffs make together the one head-officer, they must both be present, and concur. If one only is chosen, there is no head-officer. If of two chosen, one for want of proper swearing is afterwards ousted, it is the same. *R. v. Smart*, T. 8 G. 3. 4 B. M. 2241.]

[When it has been usual to give notice of the cause of a meeting, if the corporation are met to do one act, (as to chuse a mayor,) they cannot do another (as to chuse a common-councilman). *Machel v. Nevins*, P. 10 G. 2 Ld. Raym. 1355.]

[Where there has been an election of a person abroad, and likely so to continue; it is a mere colour, and no election at all, and *mandamus* lies on 11 G. 1. c. 4. *R. v. Mayor of Cambridge*, H. 7 G. 3. 4 B. M. 2008.]

If a charter says, that upon such a day they shall chuse annually; they cannot chuse after the day, except upon death or removal; tho' a *mandamus* be granted for an election. *R. 2 Mod. Ca. 112. 129.*

[Where a charter required that the mayor and common clerk for the time being, and the common-council for the time being, or the major part of them, should elect; and the common-council was a definite body consisting of 36; it was holden, that a majority of the whole number must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election at all can be had. *Rex v. Bellringer*, T. 32 Geo. 3. 4 T. R. 810. *Rex v. Miller*, E. 35 Geo. 3. 6 T. R. 268.]

[But by st. 11 G. 1. c. 4. s. 1. where the election of mayors or other chief officers shall not be made on the days appointed by charter or usage, the corporation shall not thereby be dissolved, but may meet and proceed to an election on the day after, and the mayor absenting, the nearest in place may hold the court.]

[And if no election be made, or one that is void, B. R. may award a *mandamus* for electing. s. 2, 3.]

[And mayors so elected shall take the oaths before the presiding officer. s. 4.]

[But no such election shall be valid, unless as great a number be present, as are required by charter, &c. s. 5.]

By the st. 9 An. 20. no mayor, bailiff, or other officer, who should preside at an election, and return members to parliament, and who ought to be chosen annually, when he hath been in such annual office for one whole year, shall be capable of being chosen into the same office for the year immediately ensuing. — And an information lies if he be. *2 Mod. Ca. 133.*

Yet tho' an election be void, a corporate act by an officer chosen who officiates in fact, shall be good; as, an obligation sealed by a mayor *de facto*. *R. Lut. 519. Vide post. (F 29.)*

*Vide Bye-Law.*

(F 22.)

(F 22.) *Mayor, or bailiffs.*] The mayor, or chief officer of a corporation, has not any more authority than the charter gives him. *D. 3 Mod. 12.*

And therefore, if the charter does not require his presence in the election of officers, it may be without him. *D. 3 Mod. 13.*

[When there are disputes between the mayor and town-clerk, the mayor may for a time remove the corporation-books from their usual place, to prevent their falling into the other's hands, who has made improper use of them. *Rex v. Pigram, P. 32 G. 2. 2 B. M. 766.*] *Vide London (C).*

(F 23.) *Alderman.*] An alderman is the senior in years, or prudence, in a city, &c. *Latch, 231.*

And is a chief officer there to assist the mayor. *Latch, 231.*

*Vide London (D).*

(F 24.) *Recorder.*] The recorder is not only concerned in holding the courts of the corporation, but is also their common council. *1 Vent. 145.*

And therefore, where the charter requires *quod sit peritus in lege*, he may be removed for gross ignorance in the law. *Semb. 1 Vent. 145.*

Or, for unreasonable absence, to the detriment of the borough. *Semb. 1 Vent. 145.*

[A single absence in a recorder is not good cause. *R. v. Wills, H. 7 G. 3. 4 B. M. 1999.*]

[Nor, if a recorder (as justice of peace) swears the proper returning officer at an election, and also another claiming, tho' erroneously, if without bad intention. *Ibid.*]

[Or, for non-attendance at the sessions, upon notice. *R. Sal. 435.*

So, if he be chosen during pleasure, he may be removed *ad libitum*. *Vide post. (F 32.)*

But, where chosen for life, or (which is *tantamount*) generally, or *quamdiu bene se gesserit*, he cannot be removed without cause.

*Vide London (E).*

(F 25.) *Common-council.*] A power to assemble the corporation to elect and to advise, and assist the corporation, is lodged in the common-council.

The common-council consists of persons chosen pursuant to the charter for that purpose; which ought to be observed. *Per Att. Gen. Quo W. 32.*

Or, if the charter be silent, all the corporation, who assemble, makes the common-council. *Per Att. Gen. 2. W. 32.*

Or, by antient usage, a select number makes the common-council: for there shall be intended an antient ordinance, now lost, which directs it. *R. 4 Co. 77. b.*

The power of the common-council is according to the charter, or usage. *Per Pol. Quo W. 89.*

An act of common-council, pursuant to their power, binds the whole corporation. *Per Finch, Quo W. 18. Per Treby, 49. Per Att. Gen. 33. Per Pol. 89.*

But



But the court does not take notice of the power of the common-council, unless it be shewn upon record. *Per Pol. Quo W. 90.*  
*Vide London (F).*

(F 26.) *Liveryman.*] The office of a liveryman is such of which B. R. will take notice. 1 *Sal. 349.*

And he may be bound by a bye-law, &c. to all incident charges. 1 *Sal. 349. Vide Bye-Law, (B 4.)*

(F 27.) *Town-clerk.*] The office of town-clerk is ministerial.

And therefore, if he be made mayor, &c. who is the judge of the court, his office is void; for they are incompatible. *Semb. but not determined.* 1 *Sid. 305. Vide Officer, (K 5.)*

So, if he be made alderman. *Dy. 332. b. in marg. Poph. 176.*

[So, if he be made a jurat. 2 *T. R. 81. Vide id. 777.*]

But if he be chosen mayor, alderman, &c. to avoid his place of town-clerk, he may be restored to it by *mandamus.* *Noy, 78.*

A town-clerk may be chosen during pleasure, and then he will be removeable *ad libitum.* *Vide post. (F 32.)*

Or, for life, when he is chosen generally, or *quamdiu se bene gesserit.* 1 *Vent. 82.*

And then he cannot be removed except for good cause; as, for absence, or non-user. 1 *Sid. 14. Vide Condition, (S 1, 2.)*

So, a town-clerk may be chosen in reversion. *Dy. 332. in marg. Poph. 176. Noy, 78.*

(F 28.) *Common burghs. What will give a right to freedom.*] A right to freedom in a corporation accrues by charter or prescription.

By the custom of *London*, a man shall be free by birth, by service, or by the election of the court of aldermen upon a fine. 8 *Co. 126. b.*

But a man shall not have freedom in a corporation by the king's grant. 8 *Co. 126. b.*

(F 29.) *What is requisite after election.*] By the *st. 7 Jac. 6.* a mayor, &c. shall take the oath of allegiance before those who administer to him the oath of office, at his entry into his office.

Aldermen, and all officers of a corporation, shall take it before the mayor, or chief magistrate, in the public hall.

So, every freeman.

And therefore, every person chosen into an office, or freedom of a corporation, ought to take the oath of office, and the oaths of allegiance and supremacy.

So, by the *st. 13 Car. 2.* 1. a mayor, alderman, recorder, bailiff, town-clerk common-council-man, or any chosen to any place concerning the government of a corporation, if he has not received the sacrament within a year before, his election shall be void.

So, if he takes not the oaths of allegiance and supremacy, when he takes the usual oath of office.

So, if he does not subscribe the declaration against taking up arms and the covenant.—But this is now abrogated by the *st. 1 W. & M. 8.* (And 5 *Geo. 6.*)

[If the person elected mayor, &c. is not admitted, but sues out *mandamus*, he must prove that he has received the sacrament, (without notice,) notwithstanding *st. 5 G. 6. Tusten v. Newinson, P. 10 G.*

2 *Ld. Raym. 1354.*]

[But

[But if he is in possession, and only brings *mandamus* for the *insignia* to be delivered, and the trial is six months after election, he need not; for since 5 G. 1. c. 6. such election is only voidable, not void. *Crawford v. Powell*, T. 33 & 34 G. 2. 2 B. M. 1013. 1 Bl. Rep. 229. *Vide Corp.* 539.]

So, by the *st.* 25 Car. 2. 2. every officer of trust, within three months; &c. shall take the oaths, and receive the sacrament, &c.

So, by the *st.* 13 & 14 (or 13) W. 3. 6. 1 An. *st.* 1. c. 22. & 1 Geo. *st.* 2. c. 13. (*Vide* 2 Geo. 2. 31. & 9 Geo. 2. 26.)

And if any refuses the oath, &c. required by statute, he may be fined in the same manner, as by charter he may be, for refusal of the office; for refusal of the oath is a refusal of the office. R. 3 Lev. 116.

And an information lies against him. R. 1 Sal. 168.

And it is no excuse, that he has not received the sacrament within a year. R. 1 Sal. 168.

But, an office shall not be void for not taking the oaths, &c. if they are not tendered; and therefore, the tender is traversable: for the clause 13 Car. 2. relates to the former clause, which says, *he shall take, &c. when required.* R. 2 Lev. 242. R. cont. 5 Mod. 318. Sal. 429.

[If there is an entry of administering the oaths, they shall not be called in question many years after. *Rex v. Williams, Mayor of Helston*, H. 12 G. Str. 677.]

[If the new mayor is to be sworn in before his predecessor, his presence is not sufficient without his assent. *Rex v. Ellis*, M. 8 G. 2. Str. 994.]

[On an election under 11 G. 1. c. 4. the person must be sworn in before the presiding officer at the election. *R. v. Charles Malden*, M. 7 G. 3. 4 B. M. 2130.]

[Whether he can be sworn in before himself. *Qu.*]

So, the office shall be void only as to himself; not as to a stranger: and therefore, a judicial act by him is good. R. cont. 2 Lev. 184. R. acc. 2 Lev. 242.

If any corporate act. R. Lut. 519.

So, judicial acts by a bishop *de facto* are not void. R. 2 Cro. 554. 2 Rol. 131.

So, a quaker who takes the affirmation, instead of the oath, in the usual form required of a freeman, ought to be admitted to his freedom. R. 5 Mod. 403.

So, by the *st.* 5 Geo. 6. none shall be removed, or incur a disability, &c. by omitting the sacrament a year before his election, unless a prosecution be commenced within six months after election, and carried on without wilful delay.

So, a freeman, who has not an office, or share in the magistracy of the corporation, need not take the sacrament. R. F. g. 47.

(F 30.) *Removal from an office. By resignation.*] Every member or officer of a corporation may resign his place or office. R. 2 Rol. 456. l. 10. 1 Sid. 14. Semb. cont. 1 Rol. 137. R. Poph. 134. R. 2 Rol. 11.

And a corporation has power to take such resignation. 1 Sid. 14.

And a resignation by *parol*, if it be accepted and an entry made of it,

it, is sufficient. *Semb. per B. R. H. 11 W. 3.* upon a return of a *mandamus* to the mayor of *Rippon*. *Sal. 433.*

And if the resignation be accepted, he cannot afterwards claim to be restored. *R. 1 Sid. 14. Sal. 433.*

[If a man in possession of one office, accepts another which is incompatible with it, this implies a surrender of the former. *Semb. per Lord Mansfield, Rex v. Trelawney, H. 5 G. 3. 3 B. M. 1615.*]

[The office of capital burghs is not incompatible with that of steward, but possibly that of mayor may. *Rex v. Trelawney, H. 5 G. 3. 3 B. M. 1615.*]

(F 31.) *By the corporation. For what cause allowed, and for what not.*] So, a corporation by charter, or prescription, for good cause, may remove an officer from his office. (*Vide 2 Str. 819.*)

So, if by prescription he was amovable, tho' the corporation accepts a charter, which does not give such a power. *R. Ray. 439.*

[A corporation has the power of amotion, tho' not given by charter or prescription; it is incident. *Rex v. Richardson, P. 31 G. 2. 1 B. M. 517.*]

[A removal must in general be by the act of the whole body. It is incident to the corporation at large to disfranchise, not to a select body. And it does not follow that a select body, who have a right to elect, have from thence a right to disfranchise. And if a special power be delegated to part of the body, it must be shewn. *Cowp. 502. Doug. 149.*]

As, if he does a thing contrary to the duty of his place, the weal of the borough, or oath of his office. *11 Co. 99. a.*

So, if an alderman be convicted as a common drunkard: for he is not fit for government. *R. 2 Rol. 455. l. 50. Dub. 1 Rol. 409.*

So, if an alderman removes out of the borough, and upon express summons refuses to attend the service there. *R. 4 Mod. 36. Semb. Sho. 259.*

[But an alderman with his family having left the borough for four months is not a good cause. *R. v. Mayor of Leicester, P. 7 G. 3. 4 B. M. 2087.*]

[A corporate office does not become, *ipso facto*, vacant, by the non-residence of the corporator: it may be a forfeiture; but the corporator does not lose his franchise till a sentence of amotion has been pronounced. *2 T. R. 772.*]

[Where non-residence is a good ground of *amotion*, it is unnecessary, before proceeding to amove the party, to summon him to come and reside. *Doug. 149.*]

Nor, that an alderman is above 70 years of age. *R. 2 Rol. 456. l. 5. 2 Rol. 11.*

That he misbehaved himself when he was mayor. *Semb. Sti. 151.*

Or, did not account for money received by him to the use of the corporation. *Sti. 151.*

Or, wrote a letter to a secretary of state, which charged the mayor with subornation. *Carth. 174.*

*Vide post. (F 33, 34.)*

(F 32.) *When, ad libitum.*] So, a ministerial officer chosen *durante beneplacito*  
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*beneplacito* may be removed *ad libitum*: as, a town-clerk. R. 1 Vent. 77. 82. Ray. 188. 1 Lev. 291.

So, a recorder. R. 1 Vent. 342. 2 Jon. 52.

So, if the charter says, that the recorder shall continue *durante beneplacito*, tho' there are no negative words. R. 2 Jon. 52.

And tho' the election be general, if it be not under the common seal. R. 2 Jon. 52. 1 Vent. 355.

So, a custom to remove a common-council-man *ad libitum* is good. Dy. 332. b. R. 2 Cro. 540. 2 Rol. 112. Sal. 430.

So, where a mayor, &c. has power to chuse his town-clerk, he may also remove him *ad libitum*. R. 1 Sid. 15.

And where an officer is removable *ad libitum*, he may be removed without summons or hearing of him, &c. 1 Sid. 15. 1 Lev. 291.

But generally, an officer shall not be removed without cause.

Tho' the charter says, generally, that he may be removed. Dy. 332. b. in marg.

So, a custom to remove an alderman, or judicial officer, *ad libitum* is void; for he cannot be removed without cause. Dy. 332. b. in marg. 2 Cro. 540. 2 Rol. 112.

So, tho' the charter says, that they may chuse for life *si viderint expedire*, they cannot amove *ad libitum*, without a power for it. R. 1 Lev. 148.

(F 33.) *What is a cause for disfranchisement, and what not.*—[If a burgeis does not take the oaths in a reasonable time, it is a waiver of his right. *Rex v. Jordan*, P. 9 G. 2. B. R. H. 255.]

So, if a burgeis acts contrary to the duty of his freedom, the public weal of his borough, or the oath taken upon his enfranchisement, he may be disfranchised; for he breaks the condition *tacite* annexed to his freedom. R. 11 Co. 98. a. Bagg. Carth. 176.

As, if he makes a riot in disturbance of the election of a mayor. R. Ray. 438.

If he continues in court, and makes orders, after the court is adjourned, and the mayor, &c. departed. Sti. 479, 480.

If he destroys, or erases the charters and evidences of the corporation. 11 Co. 99. a.

If he be convicted of a crime which renders him infamous: as, forgery, conspiracy, perjury, &c. 11 Co. 99. a.

But words to the chief magistrate *contra bonos mores* are no cause for disfranchisement: as, if he says, *you are a knave, kifs*, &c. R. 11 Co. 96. 98, 99. a.

Tho' it be upon an admonition by the mayor, for a malicious act to another burgeis. R. 2 Cro. 506.

Or says, that the mayor in the execution of his office did that which he cannot answer. R. 11 Co. 97.

Or, threatens the mayor. 11 Co. 96. a. Sti. 151. R. 2 Cro. 506.

So, a custom to disfranchise for contemptuous words, is not good. Sal. 426. 2 Lev. 200. Semb. Latch, 232. Pal. 455.

Nor, refusing to pay his proportion for the renewal of the charter. R. 1 Sid. 282.

Or, if a livery-man refuses the usual payments for support of the company. Semb. c. n. Ray. 446.

If he sues out of the court of the city, or borough. R. Dy. 333. a. Or,

Or, refuses to submit a thing in suit to abitrament. *Cro. El.* 33.

So, an attempt, menace, or conspiracy to do an act contrary to his duty, or which tends to the destruction of the corporation, is no cause, if he does it not. *R. 11 Co.* 98. *b.*

As, if he threatens the ruin of their charter, or privileges. *11 Co.* 97. *b.*

If he dissuades the payment of customs due. *R. 11 Co.* 97. *b.*

So, an indictment for felony, or other offence, is no cause of removal, before he be convicted; for he may be falsely indicted. *Sti.*

479.

Nor, an indictment after removal, tho' the offence was done before. *Ibid.*

[Absence from four occasional great courts, and one upon a stated day, when no personal notice is given, when presence is not necessary, when no particular business is obstructed by absence, is not cause of amotion. *Rex v. Richardson*, *P.* 31 *G.* 2. 1 *B. M.* 517.]

Bankruptcy is not cause of amotion from being a common-councilman. *Rex v. Liverpool*, *H.* 32 *G.* 2. 2 *B. M.* 723.]

*Vide post.* (F 34.)

[If a power be reserved to the crown, in a charter of incorporation, to amove, by order of council, one or more of the corporators, and the charter declare that all or any of them so amoved, shall actually, and without further process, be amoved, and provide at the same time, that upon such amotion, the remaining corporators may proceed to fill up the vacancies; this power cannot be exercised to such an extent, as not to leave a sufficient number to make a re-election; and therefore, an amotion of all is illegal and void. 2 *T. R.* 568.]

(F 34.) *How a man shall be amoved, or disfranchised.*] A corporation, having power by prescription, or the exprefs words of the charter, to amove or disfranchise, &c. may so do for good cause: and such amoval will be *per legem terre*. *R. 11 Co.* 99. *a.*

If they have no exprefs power, yet they may, after conviction of a crime which is a good cause for amoval, or disfranchisement. *11 Co.* 99. *a.* *Semb.* 1 *Sid.* 14.

[A man may be disfranchised for an indictable offence, without his being convicted of it. *Per cur.* *Rex v. Mayor of Derby*, *T.* 8 *G.* 2. *B. R. H.* 153.]

So, they may, if the corporation, which had power by prescription, takes a new charter which does not give such authority; for the ancient power continues. *R. Ray.* 439. 1 *Vent.* 355.

And they may amove, if the party does not appear upon summons.

Tho' he was summoned but the very day of the amoval, if he resides in the same town. *R. 1 Vent.* 19.

But, a corporation not having exprefs power by charter, or prescription, cannot amove from an office, or freedom, before the person be convicted of an offence, which is a good cause for removal. *11 Co.* 99. *a.* (*Vide* 2 *Str.* 819.)

So, they cannot amove upon a command by the king and council. *Cont. per three J. Twissd. tacente.* 1 *Vent.* 20.

So, if they have an exprefs power, &c. they cannot amove, without summoning the party to answer for himself, and hearing him;

for he may have a good excuse. *R. 11 Co. 99. a. R. 1 Sid. 14. Vide Mandamus, (D 3, 4.)*

Nor, without reasonable warning. *11 Co. 99.*

Nor, by an order; for it ought to be a corporate act under the common seal. *5 Mod. 259.*

[If the mayor, aldermen, bailiffs, and citizens, in common-council, have the power of electing, and the mayor and aldermen only, the power of amoving, if they are all met in common-council, the mayor and aldermen so assembled cannot amove; there must have been a summons for them to meet in their distinct capacity. *Rex v. Mayor and Alderman Carlol, T. 6 G. Str. 385.*]

[If a summons of the assembly is necessary, every member must be summoned, to make it a regular assembly. *Kynaston v. Shrewsbury, T. 9 G. 2. Str. 1051. B. R. H. 147.*]

So, if it has a power by prescription, &c. the corporation ought to shew that it has used to remove; for it is not sufficient to say, that they are always removable. *Sti. 479, 480.*

If a freeman, or officer, in a corporation be amoved, &c. without cause, a *mandamus* lies. *Vide Mandamus (A).*

[And an order of restoration of a corporator illegally disfranchised relates to the original right. *Cowp. 503.*]

### (G) Franchises, how destroyed.

#### (G 1.) By Re-Union to the Crown.

**I**F franchises and liberties are granted by the king, which were before *in esse*, as flowers of his crown, and afterwards by escheat, surrender, or otherwise, come back to the crown, they are re-united to the crown, and the king has them *in jure corona*, as before. *R. 9 Co. 25. b. Vide Liberties, (C 1, 2.)*

As, if the king grants *bona felonum*, &c. to an abbot, and his possessions are given to the king by the *st. 27 H. 8. or 32 H. 8.* the king is seised again of the same things, as before, *in jure corona.* *9 Co. 25. b.*

So, a common in gross. *Jon. 285.*

So, a liberty to be quit of *swanimote*; or other liberties in the nature of purveyance. *Jon. 270.*

So, if liberties, franchises, &c. which were appendant to a manor, as, wrecks, waifs, estrays, &c. come with the manor to the king; the appendancy is extinct, and the king is seised of them, as before, *in jure corona.* *9 Co. 25. b. Cro. El. 591. 1 And. 87.*

So, if liberty to hunt within a forest be granted to an abbot, who has the manor of *W.*, and the manor comes to the king; the liberty shall be extinct. *Jon. 286.*

But if franchises, liberties, &c. created *de novo* by the king, come back to the crown; they are not merged, or extinguished in the crown. *9 Co. 25. b. 1 And. 87.*

As, a fair, or market, with toll, &c. for the king would lose them for ever, if they should be extinguished. *R. Cro. El. 592.*

A park, warren, &c. *Cro. El. 592.*

If a lieutenant of the king's chace has title by prescription to hunt within the manor of *S.* as in the purlieu of the chace; if the manor comes to the king, and afterwards is regranted, the liberty to hunt there is not extinct. *R. Dy. 327. a.*



If a hundred is severed from the county before the *ſt.* 14 *Ed.* 3. 9. and afterwards comes back to the crown; it ſhall not be extinct. *Dub.* 3 *Mod.* 200.

If a liberty to have a *ſwanimote* court held in his manor be granted; it ſhall not be extinguished, if the manor comes to the king, and is afterwards regranted. *Jon.* 286.

[When an integral part of a corporation is gone, and the corporation has no power to reſtore it, or to do any corporate act, the corporation is ſo far diſſolved that the crown may grant a new charter. 3 *T. R.* 199.]

#### (G 2.) By Surrender.

A ſurrender of a charter by writing ſhall be void, if it be not inrolled. *R.* 1 *Sal.* 191.

Every ſurrender of their liberties, &c. does not diſſolve the corporation. *Semb.* 2 *Mod. Ca.* 361.

If a ſurrender of a charter be void: a new grant, in conſideration of ſuch ſurrender, ſhall be alſo void.

And if the old members act by themſelves, after the new charter, and by colour thereof; their acts ſhall be good, in reſpect of their antient right. *R.* 1 *Sal.* 191.

But, after a new charter upon a void ſurrender, if the old members join with thoſe, who have no authority but by the new charter; their acts will be void, tho' the old members are the majority. *R.* 1 *Sal.* 191.

#### (G 3.) By Forfeiture.

So, franchises may be forfeited by breach of the truſt, upon which they were granted, and perverſion of the end of their grant, or inſtitution.

As, if a leet be diſuſed, and has no officers, or inſtruments for puniſhment. *Jon.* 283.

So, a corporation itſelf may be forfeited, if the truſt upon which it was created be broken, and the inſtitution of it perverted. *Per Holt,* *Sho.* 280. 4 *Mod.* 58. *Skin.* 310.

So, franchises may be forfeited by *miſuſer*, or *abuſer*, or other miſdemeanor in him to whom they are granted.

[A judgment of ſeizure *quouſque*, againſt a corporation, in default of appearance, operates as a *final judgment* to diſſolve the corporation, if they do not appear in the ſame term, or the next at fartheſt. 2 *T. R.* 568.]

[The only uſe of a final judgment in ſuch a caſe, is to ſhew the crown's election to take advantage of the forfeiture; but any other matter of record, ſhewing the election, may equally anſwer the purpoſe. *Ibid.*]

[Therefore a new charter of incorporation granted after that time to a new body of men in the ſame place is good, notwithstanding a charter of reſtitution be afterwards granted to the old corporation; and ſuch charter of reſtitution is abſolutely void. *Ibid.*]

#### (G 4.) By the Diſſolution of a Corporation.

(G 4.) *What ſhall be a diſſolution.*] So, franchises may reſult to the king, or donor, if the body to whom granted be diſſolved, or extinguished;

guished; as, if land be given to an abbot and convent, who all die, by which the corporation is dissolved; the land does not escheat, but the donor shall have it again. *Co. L. 13. b. 2 And. 107.*

So, if land, or other possessions, are granted to a dean and chapter, mayor and commonalty, &c. who are dissolved. *Co. L. 13. b. R. Godb. 211. 1 Rol. 816. l. 22.*

So, if a corporation by constituted of brethren and sisters, and all the brethren die, or all the sisters; the corporation is thereby dissolved, *1 Rol. 514. l. 40.*

So, if a corporation refuses to continue the election of officers, till all die who could make an election; for thereby the corporation is dissolved.

Or, if the king names the head of the corporation, and they refuse his nomination till the body be dead. *Jen. 168.*

So, if the abbot, and all the monks of a convent are deraigned, and relinquish their habit and order; the corporation is dissolved, *Dav. 1. b.*

If a chapel, and all the possessions thereto annexed, be aliened; the chaplain ceases; for he cannot be a chaplain of nothing. *3 Co. 75. a.*

But if a corporation gives an obligation under the common seal, and some of the principal members sign it, but the words are, *noverint nos magistrum & guardian, &c. teneri, &c.* by their corporate name; if the corporation be afterwards dissolved, the particular members shall not be charged. *R. 1 Lev. 237.*

(G 5.) *What shall not be a dissolution.*] But by a change of the name, or a new incorporation of the same persons, the old corporation is not extinct, nor the privileges granted to it.

So, if a dean and chapter grant their church, and all their possessions; their corporate capacity continues. *3 Co. 75. a. Jen. 168.*

If a manor, which is the whole body of a prebend, be evicted, the prebend continues. *3 Co. 75.*

If by surrender, or act of parliament, all the possessions of an hospital are resumed, the master and brethren of the hospital continue. *Dav. 1. b.*

So, if the franchises of a corporation are seized, or surrendered, the corporation itself continues. *Per Holt, Skin. 311.*

[Judgment of *oyster* against mayor and aldermen, and their deaths before any others are appointed, is not a dissolution: tho' they are without magistrates, and cannot act, yet a right remains, capable of being revived by the crown. *Borough of Colchester v. Seaber, P. 6 G. 3. 3 B. M. 1866. 1 Bl. Rep. 591.*]

(G 6.) *When franchises are not gone by the dissolution of the corporation.*] If a corporation have granted over their possessions to another, before their dissolution, they do not return to the donor. *R. 1 Rol. 816. l. 19. 20.*

*Vide Prærogative, (D 30. 53.)—Retorn, (B 1, &c.)*

## FRANK-FEE.

*Vide Ancient Demesne (B).*

## FRANK-MARRIAGE.

*Vide Estates*, (B 6.)

## F R A U D.

*Vide Bankrupt*, (C 2, &c.)—*Chancery*, (2 Q 5.)—*Deceit*, and the *References there marked*.

## F R E E D O M.

*Vide Franchises*, (F 28. 33, 34.)

## F R E E H O L D.

*Vide Abeyance*—*Chancery*, (4 G 4.)—*Copyhold*, (K 14.—R 15.)—*Esseignise*, (G 1.)—*Parceners*, (A 4.)—*Pleader*, (3 K 22.)—*Prohibition*, (F 2, &c.)—*Remitter*, (C 4.)

## F R E I G H T.

*Vide Merchant*, (E 3.)

## F R U I T S.

*Vide Dismes*, (H 10.)

## G A M E.

*Vide Justices of Peace*, (B 43, &c.)

## G A M I N G.

*Vide Bankrupt*, (D 38.)—*Justices of Peace*, (B 42.)—*Pleader*, (2 G 8.—2 W 26.)

## G A O L, A N D G A O L E R.

*Vide Imprisonment* (A—B, &c.—F).

## G A O L-D E L I V E R Y.

*Vide Justices* (H).

## G U A R D I A N.

## (A) Guardian in Chivalry.

**G**UARDIAN is by the common law, or by statute. 3 Co. 37. b.

There are four guardians by the common law: in chivalry, by socage, by nature, by reason of nurture. 3 Co. 37. b. Co. L. 88. b.

If a man had died seised of lands holden by knight's service, the lord had the wardship of the land, and the person of his heir-male, till his age of 21 years. Lit. f. 103.



And of his heir, if it was a female, till her age of fourteen years. *Lit. f. 103.*

And by the *st. W. 1. 22.* if such heir-female was within fourteen years at the death of her ancestor, and unmarried, till her age of sixteen years, *viz.* for two years longer; but if she was above fourteen, or married before fourteen, it remains as at the common law. *Lit. f. 103.*

If the lord die, his executor shall have the ward, till his age of twenty-one years. *Lit. f. 125.*

By the *st. 32 H. 8. 1.* which allows of devising two parts of lands holden in *chivalry*, the wardship of the heir for the other third part is saved to the lord.

And if two are joint-tenants of land for life, and to the heirs of one, who dies; his heir shall be in ward during the life of the other.

So, by the equity of the same statute, if land be settled to the mother for life, remainder to the father in fee, and he dies; the lord shall have the wardship of the heir within age, and not his mother. *2 Cro. 40.*

Or, to the mother for life, remainder to the father for life, and afterwards to the heirs of his body, and afterwards to him in fee. *R. 2 Cro. 40.*

But if land descend to the son as heir to his mother, in the life of his father, the father shall have the wardship of the person of his heir apparent, tho' the lord has the wardship of his land. *Co. L. 84.*

Tho' a daughter be his heir apparent, the father shall have the wardship of her body, and her marriage. *R. 6 Co. 22. Mō. 738.*

So, if the father marry his daughter, who is his heir apparent, and afterwards by a second venter has a son, he shall not answer to the lord for the marriage, tho' he could not have her marriage after the birth of his son. *Mō. 739.*

Yet the mother after the death of her husband shall not have the wardship of his heir apparent, tho' she has land descendible to him. *Mō. 738. Lit. f. 114.*

So, the father shall not have the wardship of any other than his son or daughter, tho' it be his presumptive heir. *Co. L. 84. a.*

Nor, shall the father, if he be an alien, attainted, &c. have the wardship of his son; for then he is not his heir apparent. *Co. L. 84. b.*

But now, by the *st. 12 Car. 2. 24.* all tenures by knight's service of the king, or of any other person, and by knight's service *in capite*, and by socage *in capite* of the king, and the fruits and consequents thereof, are taken away and discharged. And all tenures of honours, manors, &c. held either of the king or any other person, are turned into free and common socage.

### (B) Guardian in Socage.

(B 1.) Who shall be.

**I**F a man die seised of lands holden in socage, his heir within the age of fourteen years, the next friend of the heir, to whom the inheritance cannot descend, shall have the wardship of the land, and of the heir, till his age of 14 years. *Lit. f. 123. 2 Rol. 40. 4. 10.*  
And

And by the *ſt.* 12 *Car.* 2. 24. all tenures are turned into free and common ſocage.

And therefore, if the anceſtor die ſeiſed of lands holden in ſocage, the next friend of the heir, to whom the inheritance cannot deſcend, ſhall be his guardian.

As, if land deſcend on the part of the father, the mother, or next friend on the part of the mother, ſhall be guardian. *Lit. ſ.* 123.

Or, if land deſcend on the part of the mother, the father, or next friend on the part of the father. *Lit. ſ.* 123.

If a woman has two ſons by divers husbands, and dies, her young-eſt ſon within fourteen, his brother of the half blood ſhall be guardian before his uncle. *Per two J. Warb. cont. Mo.* 635. *Ow.* 128. *Cra. El.* 825. *Dub.* 2 *Jon.* 17.

If there are three ſons, and the young-eſt dies ſeiſed of lands in ſocage, his heir within the age of fourteen years, the eldeſt ſhall be his guardian; for he ſhall be preferred as the moſt worthy. *Co. L.* 88. *a.*

So, if a man be donee in *frank-marriage*, and die, his heir within fourteen, the next friend of the part of the mother ſhall be guardian; for the mother was the cauſe of the gift. *Co. L.* 88. *a.*

Yet generally, where there are ſeveral in equal degree, he who firſt ſeiſes the heir ſhall be guardian; as, if land be given to *A.* and the heirs of his body, the next couſin on the part of the father, or on the part of the mother, who firſt takes the heir, ſhall be his guardian, and the friend on the part of the father ſhall not be preferred. *Co. L.* 88. *a.*

So, if a man dies ſeiſed of land on the part of his father, and other land on the part of his mother, the next of blood on the part of the father ſhall enter into the land on the part of the mother, and the next of kin on the part of the mother into the land on the part of the father. *Co. L.* 88. *a.*

If *A.* be guardian in ſocage to *B.* and another dies, his heir within fourteen years, to whom *B.* is next friend, *A.* ſhall be his guardian by reaſon of his ward. *Co. L.* 88. *b.*

There ſhall be a guardian in ſocage, tho' the heir be iſſue male, or female. *Co. L.* 88. *a.*

Tho' he be a brother, or other couſin of his anceſtor. *Co. L.* 88. *a.*

#### (B 2.) Who not.

But the guardian in ſocage ought to be the next in blood; and therefore the next in affinity ſhall be excluded. *Co. L.* 88. *a.*

So, every one ſhall be excluded, to whom the inheritance by poſſibility may deſcend: and therefore, if a man has two ſons by ſeveral venters, and the young-eſt dies ſeiſed of land in borough-english, his heir within fourteen, the eldeſt ſon of the half blood ſhall not be guardian; for the land by poſſibility may deſcend to the uncle, and afterwards to him. *Co. L.* 88. *b.*

So, if an infant claims by purchaſe, not by deſcent as heir, he ſhall not be in ward. 2 *Mod.* 176.

So, an infant cannot be guardian; for account does not lie againſt him. *Co. L.* 88. *b.*

Nor, an idiot, lunatic, or *non compos.* *Co. L.* 88. *b.*

Nor,

Nor, a leper, removed by a writ *de leproso amovendo*. *Co. L. 88. b.*

Nor, *furdus*, *cæcus*, and *mutus*. *Co. L. 88. b.*

If the guardian die, his executor or administrator shall not have the ward. *Vau. 181.*

If a wife, being a guardian, die, her husband shall not have it, tho' he survive. *Co. L. 89. a.*

So, a guardian in focage cannot devise his wardship to another, but the next friend to the heir, after the death of the first guardian, shall have it. *Vau. 178. 181.*

Nor, shall it be forfeited by his outlawry or attainder. *Co. L. 88. b.*

(B 3.) What Things he shall have.

Guardian in focage shall have the custody of the land, and body of the heir, till his age of fourteen years.

If the heir has a rent-sock, common of pasture, or other inheritance which does not lie in tenure, the guardian shall have the custody of them as well as of his land. *Co. L. 87. b.*

(B 4.) What he may do.

Guardian in focage may take all the profits of the estate of the heir for his benefit.

So, he may make a lease of the infant's estate till his age of fourteen years. *2 Rol. 41. l. 17. 2 Cro. 98.*

And upon such lease the lessee may maintain an ejectment. *2 Rol. 41. l. 17.*

And acceptance of a lease by a guardian by the lessee of the father, is tantamount to a surrender of the first lease. *R. 1 Leo. 158. 322. Ow. 45.*

So, a guardian may make an admittance, or voluntary grant of a copyhold; for he is *dominus pro tempore*. *Vide Copyhold, (C 3.)*

So, a grant of a reversion of a copyhold; tho' it does not fall during the nonage. *2 Rol. 41. l. 12. 2 Cro. 99. Vide Copyhold, (C 3.)*

So, a guardian in focage may avow in his own name and right, for rent upon a lease by him. *2 Cro. 98.*

So, he may have trespass, or ravishment of ward. *2 Cro. 99. F. N. B. 140. C.*

So, an ejectment of ward, for the land of the infant. *F. N. B. 140. C.*

(C) Guardian by Nature.

**I**F a son has lands as heir to his mother, which are holden by knight's service, his father shall be guardian of his body, and shall have his marriage, and not the lord; for none shall be in ward to another, living his father. *Lit. f. 114. Co. L. 88. b. Mo. 738.*

And therefore, if the father be lord of the land holden by knight's service, he shall have the custody of his heir apparent as father, and not as lord. *Co. L. 84. a. 3 Co. 39.*

Be the heir apparent son, or daughter. *Co. L. 84. a. 3 Co. 38.*

And the father shall have the guardianship of his heir apparent till his age of twenty-one years. *Semb. Carth. 385. 5 Mod. 223.*

But



But this extends only to the custody of the body and the marriage of his heir; for the lord in *chivalry* shall have the custody of the land. *Co. L. 84. a.*

So, it does not extend to a collateral heir, but only to his son or daughter, his heir apparent. *Co. L. 84. a.*

So, it extends only to the father; for the grandfather shall not have the wardship of his heir apparent. *6 Co. 22. b.*

Nor, the mother by the common law. *Semb. 3 Co. 38. Co. L. 84. b.*

So, if the father be an alien, he shall not have the wardship of his son; for he cannot be his heir. *Co. L. 84. b.*

Or, if he be attainted. *Co. L. 84. b. 3 Co. 38. a.*

If the father be outlawed, it shall not be forfeited. *3 Co. 39. a.*

Nor, shall it go to the executor or administrator of the father. *3 Co. 39. a.*

Nor, can it be granted or disposed by the father to another. *R. Vau. 180.*

So, if the father be guardian in socage, he shall have the custody of his son as guardian, not as father. *Co. L. 88. b.*

So, if the father commits waste, he forfeits his guardianship. *Hard. 96.*

#### (D) Guardian by reason of Nurture.

SO, the father and mother of an infant, who is not an heir apparent, shall be guardian to him, till his age of fourteen years, by reason of nurture. *8 Ed. 4. 7. b. 3 Co. 38.*

And by the course of the law, the wardship is cast upon him, when the infant has no land. *8 Ed. 4. 7. b.*

So, after the death of the father and mother, the grandfather or great-grandmother shall have the care of the grandsons and granddaughters. *Fl. 1. c. 6.*

So, *nepotes & neptes sunt in potestate avi paterni, & eo mortuo recidunt in potestate patris.* *Fl. 1. c. 7.*

But it was agreed, that the father or mother shall have the nurture of the infant, and not the grandfather. *Mo. 738.*

And the father or mother by reason of the nurture shall have trespass against a stranger, who takes the infant. *Mo. 738.*

[Children have a natural right to the care of their mother; and the court will order a grandfather to deliver them up to her. *Mellish v. Da Costa, M. 1737, 2 Atkins, 14.*]

[But if a rich uncle takes three infant neices into his house, and leaves them large fortunes, and they remain in the house with one of the executors, the court will not, on petition of their father, order them to be delivered over to him. *Hopkin's case, M. 1732, 3 P. W. 152.*]

But, a stranger to the infant cannot be his guardian by reason of nurture. *8 Ed. 4. 7. b.*

So, *natus ex filia non erit in potestate avi sed patris.* *Fl. 1. c. 6. Co. L. 84. b.*

Guardian by reason of nurture is for the education or governance of an infant, who has no other guardian, till his age of discretion. *8 Ed. 4. 7. b.*

And

And therefore he cannot detain the infant against his guardian in *chivalry*, or *focage*. 11 H. 4. 54. b.

If he discharges the infant out of his house, and he binds himself apprentice, he cannot afterwards retake him. 8 Ed. 4. 7. b.

If he grants the infant to another, that binds himself, and he cannot afterwards retake him. *Dub.* 8 Ed. 4. 7. b.

If he makes a lease of the lands of the infant, nothing passes but only at will; for he has no interest in the land. 1 Leo. 158. R. Cro. El. 678. 734.

But if a guardian by reason of nurture delivers the infant to another for his instruction, he may afterwards retake him. R. 8 Ed. 4. 7. b.

If he grants the infant to another, he need not stay with the grantee. 8 Ed. 4. 7. b.

If there be an action against him by the guardian in *chivalry*, or *focage*, it will be a good plea to say, that he claims only by reason of nurture, and the other claims as ward, and he is ready to render him as the court thinks fit. 8 Ed. 4. 7. b.

So, the father or mother shall not have the wardship of the son or daughter, by reason of nurture, beyond the age of fourteen. 3 Co. 38. b.

### (E) Guardian by Statute.

(E 1.) By the *St. 4 & 5 Ph. & M.*

BY the common law there was guardian by *chivalry*, *focage*, nature, and by reason of nurture only. Co. L. 88. b. 3 Co. 37. b.

But, now by the *st. 4 & 5 Ph. & M. 8.* no persons shall take away any maid child unmarried under the age of 16 out of the possession, and against the will of her father, or of such person to whom the father by his will, or other act in his lifetime, shall appoint, bequeath, give, or grant the governance of such child, &c.

And if any shall take away such child from the possession, &c. against the will of the father, or mother of such child, &c.

And if any shall take away and deflower, &c. such child, against the will, or unknowing of the father, if living, or of the mother of such child, having the custody, or governance of such child, if the father be dead, &c.

And by this act two other guardianships are allowed; viz. guardianships by nature, or by assignation. 3 Co. 38. b.

And therefore, upon the construction of this act, the mother after the death of the father, shall have the guardianship, of his heir, or other son or daughter, till its age of sixteen years. *Semb.* 3 Co. 39. a.

And this custody is inseparable from the person of the mother; for if she marries, it shall not be vested in the husband. R. 3 Co. 39.

So, by the *st. 4 & 5 Ph. & M. 8.* the father by will, or other act in his lifetime, may bequeath or appoint the guardianship of his child. *Semb. per Dyer*, that he may. *Dal.* 74. R. 3 Co. 39. a. *Semb. cont. Vau.* 178.

But the custody of the mother after the death of the father, of his heir apparent after 14 till 16, was only for this purpose, that he who takes her and marries her shall incur the penalty of the *st. 4 & 5 Ph. & M.* *Semb.* 3 Co. 39. a.

[A ballad

[A bastard is within this statute. *Rex v. Cornforth*, H. 15 G. 2. *Str.* 1162.]

(E 2.) By the *St. 12 Car. 2.*

But now, by the *st. 12 Car. 2. 24.* the father, of age, or under age, by deed, or by his last will in writing, executed in the presence of two or more witnesses, may dispose the custody and tuition of his child, or children born, or in *ventre sa mere*, till their respective ages of 21 years or less time, in possession or remainder, to any, but a popish recusant.

And such disposition shall be good against all claiming as guardian in focage, or otherwise.

And such person may maintain trespass, or ravishment of ward against any who detains such child, and may recover damage in such action for the benefit of such child.

And may take into his custody, to the use of such child, all profits of lands, tenements and hereditaments of such child, and his goods, chattels, and personal estate, and may bring such actions as guardian in focage might do.

[Testamentary guardian cannot make a lease of infant's lands; and such lease is absolutely void. *Roe v. Hodgson*, T. 33 & 34 G. 2. H. 1 G. 3. 2 *Willf.* 129. 135.]

The guardian appointed by the *st. 12 Car. 2.* has the same interest in all respects as a guardian in focage had before, except as to the time and *modus habendi*. *Vau.* 179.

And therefore, he cannot by deed, or will, transfer the custody of his ward to another. *Vau.* 179, &c. *R. Eq. Ca.* 42. (2d part of 2 *Mod. Ca.*)

Nor, shall it go to his executor or administrator. *Vau.* 180. 182.

And if the guardian dies, it determines, as if it was never disposed. *Vau.* 185.

If a *feme* guardian marry, the guardianship is not transferred to the husband, nor shall it be forfeited by the attainder or misdemeanor of the husband. *Eq. Ca.* 138. (2d part of 2 *Mod. Ca.*)

So, the ward has the same remedy against his guardian by this act, as there was before against a guardian in focage. *Vau.* 179.

But the mother cannot by her deed, or will, dispose the custody of her son. *Vau.* 180.

If a mother by will appoints a guardian, it is void; and the infant (being fourteen) shall chuse a guardian in court. *Ex parte Edwards*, T. 1747, 3 *Atkyns*, 519.

Neither can the grandfather appoint guardians of his grandson; but he may give his estate to him on condition that such and such persons be his guardians; and if the father do not submit to the will, the court will make the father's opposition work a forfeiture of his son's estate. *Ambler*, 306.]

[So, neither can a man regularly appoint a guardian to his natural child: but, if in fact he name guardians, the court will appoint them, unless some objection appear to them, without referring it to the master to examine, who is proper to be appointed guardian. 2 *Brown.* 583.]

So, if the father devise his land to B. during the minority of his heir



heir for his benefit, this does not amount to a devise of the custody of the heir. *Vau.* 184.

So, if he devise the custody of his heir, without saying, for what time, it will be void for the uncertainty, if the heir was above 14. *Per Vau.* 184, 5.

Otherwise, if he was under 14; for then it will be good till such age. *Vau.* 184.

So, if a freeman of *London* devise the custody of his son, it will be void; for by the *st.* 12 *Car.* 2. 24. the custom of *London* is saved. *R.* 1 *Sid.* 363.

[If there are four testamentary guardians of the children of a presbyterian, and one of them has put them to a school, to be educated according to the church of *England*, the court will not order them to be delivered to the other three. *Storke v. Storke*, *T.* 1730, 3 *P. W.* 51.]

### (F) Guardian by Election.

#### (F 1.) Of the Heir himself.

**I**F a man die seised of a rent-seck, common of pasture, or such hereditament as does not lie in tenure, and of no other hereditaments, his heir being within 14 years, the heir having no guardian assigned, &c. may chuse his guardian. *Co. L.* 87. b.

#### (F 2.) Of the Court.

If an infant be of such a tender age, that he cannot chuse, a guardian may be assigned to him.

If he sue, or be sued in *B. R.* or *C. B.* a guardian may be assigned for him by the court. *Vide Pleader*, (2 *C* 1, 2.) — *Vide Chancery*, (3 *R* 1, 2.)

So, in the spiritual court, it is usual to assign a curator to the infant. 2 *Jen.* 90.

And it may be done as to personal estate. 2 *Lev.* 163.

And the ordinary, when he assigns such curator, may take a bond from him for performance of the trust. *Semb.* 2 *Lev.* 163.

And the bond may be taken to him and his commissary. *Dub.* 2 *Lev.* 163.

[The ecclesiastical courts ought not to appoint guardians *ex officio*, without a suit instituted; for it is breaking in upon the jurisdiction of Chancery; and *semb.* that a *quo warranto* would lie. *Buck v. Draper*, *H.* 1747, 3 *Atkyns*, 631.]

So, if the father or guardian do wrong to the infant, any one may sue as guardian to the infant. *R. Hard.* 96.

[A guardian may be appointed by Chancery, tho' no suit is depending. *Ex parte Birchell*, *T.* 1754, 3 *Atkyns*, 813.] *Vid.* 1 *Brown.* 556, where it is said the petition in such a case must be according to the statute.

[The court never appoints a guardian to a woman, after marriage. *Roach v. Garvan*, *M.* 1748, 1 *Vesey*, 157.]

When Chancery will appoint, or remove a guardian, *vide* in Chancery, (3 *O* 1, &c.)

## (G) Guardian by Custom.

AS to guardian, by custom of a manor, for a copyholder, *vide Copyhold*, (K 5.)

## (G 1.) Orphans.

By the custom of *London*, the mayor and aldermen of *London* have the custody of every orphan within the city, *viz.* when any one free of the city dies, leaving an orphan within age, and not married. 1 *Rol.* 550. l. 40.

And custody of the lands and goods of the orphan was given by the *st.* 1 *R.* 2. *Rot. Par.* No. 130. *R. Hob.* 247.

So, by custom within other cities and boroughs. *Adm.* by the *st.* 4 & 5. *Ph. & M.* 8.

And they have the custody of males till the age of 21 years, of females till 18 or marriage. 1 *Sid.* 250.

And therefore, the mayor and aldermen of *London* have the government of the body, lands, and chattels of an orphan. 1 *Sid.* 250.

Tho' the land lies out of *London*. *Semb.* 1 *Sid.* 250.

Tho' the father devise the guardianship to another; for by the *st.* 4 & 5 *Ph. & M.* 8. and 12 *Car.* 2. 24. the custom of *London*, and other boroughs as to orphans, is saved.

Tho' the father at the time of his death did not live in *London*. *Semb. cont.* 1 *Sid.* 250.

So, the wife of a freeman is within the custom. 1 *Rol.* 550. l. 40.

After the death of a freeman of *London*, the mayor and aldermen may summon his widow or executor, to appear at a court of orphanage, and give security to exhibit an inventory. 1 *Rol.* 550. l. 45. *Hob.* 247.

The chamberlain of *London* is a corporation sole, able to take a bond or recognizance to him and his successors, for orphans. *R.* 4 *Co.* 64. b.

And may oblige an executor to give security for performance of the will, and payment of legacies to the orphan. *Hob.* 247.

And if the executor or administrator refuse an inventory, or security, he may commit him till compliance. 1 *Rol.* 550. l. 45. *Hob.* 247.

Tho' he had given security before to the spiritual court to account. 1 *Rol.* 550. l. 35. *Hob.* 247.

And, if the executor or administrator be not a freeman, nor lives within the city, *Chancery* will assist in the security. *Semb. Ca. Ch.* 203.

So, if a man agree before marriage, that his wife may devise 200 *l.* which she devises to orphans; the court will oblige the husband to give security for the money, tho' he had given a judgment before for security. 1 *Rol.* 550. l. 30.

So, they may commit an orphan to the custody of another. 1 *Sid.* 250.

So, if any one take an orphan out of their custody, he may be imprisoned till he produce the infant. *R.* 1 *Sid.* 250.

And if there be a woman free of the city, or the widow of a freeman,

man, the custom, if there be such a one, shall be reasonable as to her. *Hob. 247.*

Money due to an orphan from the chamber of *London* is a debt, and not a deposit. *Ca. Ch. 182.*

And the whole personal estate, which belongs to an orphan ought to be paid there, and the chamberlain of *London* pays interest for it. *Vide Ca. Ch. 182.*

So, a mortgage in fee shall be reputed part of his personal estate. *Ca. Ch. 285.*

And an estate which he had as residuary legatee. *Ca. Ch. 310.*

Tho' he was likewise executor, and had not made his election. *R. Ca. Ch. 310.*

But land of inheritance is not part of the estate of an orphan.

Nor, a lease which attends the inheritance. *1 Ver. 104. 2 Ver. 57.*

Nor, a lease to the father, who afterwards purchases the fee in another name. *R. 1 Ver. 104.*

Nor, receipts in chymistry, physic, surgery, &c. *1 Ver. 62.*

(G 2.) *What estates belongs to an orphan.*] By the custom of *London*, if a freeman die, the surplus of his personal estate, after his debts and funerals paid, shall be distributed, one third to his wife, another third to his children, and the other third part he may dispose of by his will. *Sal. 426.*

If he has no children, one moiety shall be to the wife and the other moiety he may dispose of. *Ibid.*

Or, if all his children are advanced. *2 Ver. 665.*

If he has no wife, a moiety shall be to the children. *Sal. 426. 2 Ver. 612.*

So, if his wife be advanced by jointure, &c. *2 Ver. 665.*

[If a wife is compounded with on marriage, by having a jointure in lieu of her customary share, the husband shall not be considered as a purchaser of her third, but the orphanage share shall then be a moiety of his estate. *Morris v. Burroughs, H. 1737, 1 Atkyns, 399.*]

If he makes no will, administration shall be granted to the wife, who after a third due to her by the custom, and another third to the children, shall make a dividend of the remaining third part between herself and the children. *Sal. 426.*

If any child die after the father, before 21 unmarried, its share goes to the other children. *2 Ver. 559.*

[A child of full age may, in consideration of present advancement, bar himself of the customary share. *Lockyer v. Savage, H. 6 G. 2. Str. 947.*]

If the father advance any child in his lifetime, he shall have no part in the distribution, except where the father by his will or other writing declares expressly, that it was only in part of his advancement; and then, if he puts his share into hotchpot, he shall have a proportion with the other children out of their whole part. *Co. L. 176. b. 12 Co. 113. 2 Ca. Ch. 116, 117. Sal. 426. 1 Ver. 216. 2 Ver. 630.*

[If a freeman by will gives 200*l.* to a son, and in his life pays him 200*l.* and takes receipt in full of what was intended him by the will, this shall be considered as an advancement, and be brought into hotchpot. *Car v. Car, H. 1741, 2 Atkyns, 277.*]

[If



[If a father settles 5000*l.* on his son's marriage, on himself for life, wife for life, son for life, son's wife for life, and then to the issue of the marriage; if the son would come in for a share, he must bring the whole 5000*l.*, and not the value of his estate in it for life only, into hotchpot. *Weyland v. Weyland*, P. 1742, 2 *Atkyns*, 632.]

And the share of the child advanced shall be put into hotchpot with the whole personal estate, and not with the third part due only to the children. *Semb.* 12 Co. 113. *Cont.* 1 *Ver.* 345. 2 *Ver.* 281. 630.

Any provision will be an advancement. 1 *Ver.* 189. *cont.* unless it be upon marriage. *Ver.* 61.

[If the children, or the only child of a freeman, are advanced in the father's lifetime, they shall be deemed FULLY advanced, unless the quantum of the advancement appears. *Fawcner v. Watts*, H. 1741, 1 *Atkyns*, 406. *Elliot v. Collier*, T. 1747, 3 *Atkyns*, 526: 1 *Vesey*, 15. 1 *Wilson*, 168.]

[Advancement in marriage with a first husband dead in the father's lifetime is a bar to a second husband. *Ibid.*]

[Parol evidence of a father's declarations of advancement shall not be admitted; but of a first husband's or of the wife's in his time, it shall. *Ibid.*]

If the father declares that his daughter is advanced, she is not excluded, unless he says, to what value. 2 *Ver.* 630.

And if the value to which she is advanced does not amount to her share, if she puts it into hotchpot, she shall have her whole share. R. 2 *Ver.* 630. *Eq. Ca.* 137.

If the father declares by his will, that the money given to the daughter was not a full advancement, it is sufficient, tho' by a subsequent will he declares the contrary. R. 2 *Ca. Ch.* 117. *Vide* 2 *Ver.* 631.

[If a freeman on the marriage of his daughter gives 10,000*l.*, and there is a covenant, that if he should give more to any other daughter than 10,000*l.*, then he would make his daughter's portion equal to it; and afterwards by will directs, that one moiety of his estate should go according to the custom, and if that does not make 10,000*l.* for every other daughter, then it is to be made up out of the other moiety, and the orphanage shares come to 1700*l.* more than 10,000*l.*; this is not such a contingency as shall augment the first daughter's portion, for this will could not operate on the orphanage part. *Hanbury v. Ld. Bateman*, M. 1740, 2 *Atkyns*, 63.]

If a child advanced, afterwards dies in the life of his father, the distribution shall be to the surviving children, without regard to the dead one. 2 *Ca. Ch.* 119.

[If a man makes an executor in trust, and devises his personal estate among his seven children, and four are advanced by him in his lifetime, and one dies before the testator; the children advanced shall have their shares of this seventh part, without bringing what they had received into hotchpot. *Cowper v. Scott*, H. 1731, 3 *P. W.* 119.]

If the father settles an inheritance upon any son, tho' he says, for his advancement, he is not excluded from a share of the personal estate. 2 *Ca. Ch.* 160. 1 *Ver.* 181.

So, if the father settles an inheritance upon a daughter co-heiress. R. 1 *Ver.* 181. 216.

[Yet if a freeman by will charges 1500*l.* on his real estate for his daughter, and gives her a share of his personal estate, she may not take the sum charged on the real estate, and also claim an orphanage part, but must abide entirely by the will, or by the custom. *Cowper v. Scot*, H. 1731, 3 P. W. 119.]

If a daughter marry in the life of her father against his consent, and he is not reconciled before his death, she shall lose her portion. R. 1 Ver. 354.

If the father by his will declare his son advanced so much, proof of more shall be allowed. *Semb. Eq. Ca.* 137.

If there be no wife, the whole shall be divided among the children. 2 Vent. 341. viz. a moiety by the custom, and a moiety by the statute of distributions. Sal. 426.

And if any child die within age, his part survives to the others. 2 Vent. 341. R. Prec. Ch. 537.

If any child have a son, and die in the life of his father, the other children shall have the whole, and the son of the deceased child shall have nothing. Sal. 426.

For grandchildren are not within the custom. R. 1 Ver. 397. Eq. Ca. 137. 2 Sho. 467.

If the father settle an estate of inheritance in his lifetime upon his son, he shall have a share of the personal estate, without putting the value of the land to hotchpot; for land is not taken as an advancement within the custom of the city. 2 Ca. Ch. 118. 160. 1 Ver. 345. 2 Ver. 754.

Tho' the father covenant to lay out so much in the purchase of land for his son, which is purchased in his lifetime. R. 2 Ca. Ch. 118. 1 Ver. 345.

[If A. on his marriage with the daughter of B. has an estate in land settled on him, the purchase-money whereof is included in a receipt which he gives for his wife's fortune, it shall be considered as money, and brought into hotchpot. *Morris v. Burroughs*, H. 1737, 1 Atkyns, 399.]

If an only child be advanced in part, he shall have the whole share of the children, without putting his part received into hotchpot, which extends only to children, not to the wife. Sal. 426. *Semb. cont.* 2 Lev. 130.

For there it is said, that a voluntary settlement upon a son will be fraudulent upon the custom by which the wife claims. Ch. R. 16. *temp. Finch. Acc.* 2 Ver. 234. 629, 630. 754.

But any sum given in money to a son or daughter by the father, shall be taken for an advancement. R. 2 Ca. Ch. 118.

[Sums, however small, if given as advancement, must be brought into hotchpot, but petty sums given as presents shall not. *Morris v. Burroughs*, H. 1737, 1 Atkyns, 399.]

[So, small sums given occasionally, or maintenance-money or allowance, at the university or travelling, shall not be deemed part of child's advancement, it is only education; nor money given with him as apprenticeship. *Hender v. Rose*, T. 1718, 3 P. W. 317.]

[If a freeman has two daughters, A. and B. On A.'s marriage he gives 2000*l.* and a bond for 2000*l.* more at his death, and afterwards gives 428*l.* to buy a house, which is done; and B. marries without his consent, but he is afterwards reconciled, often stays weeks with her,

her, and gives her presents from time to time to about 500*l.*, but no advancement; *A.*'s 2000*l.* and 2000*l.* shall be brought into hotchpot, but not her 428*l.* nor *B.*'s 500*l.* *Hume v. Edwards, H. 1746, 3 Atkyns, 450.*]

[A gold watch or wedding clothes are no advancement; nor a gift of 50*l.* in money, where the orphanage share is considerable. *Elliot v. Collier, T. 1747, 3 Atkyns, 526. 1 Vesey, 15. 1 Wils. 168.*]

[Consent to a daughter's marriage does not bar her; it must appear under his hand *quantum* he has advanced her. *Ibid.*]

[If a father maintains his daughter, after her husband's death, his executor shall be considered as a creditor for so much as that maintenance deserved; which shall be deducted out of the daughter's customary share. *Ibid.*]

[But buying an office, tho' but at will, or a commission, are advancements. *Norton v. Norton, M. 1692, Rawlinson v. Hutchins, 3 P. W. 317.*]

[If some years after the marriage of a freeman's son, the parents on both sides meet, and agree to advance 200*l.* a-piece to lie by till they can purchase a commission in the army for him; this is a marriage-portion, and bars him of his orphanage part. *Hearn v. Barber, H. 1744, 3 Atkyns, 213.*]

[But he is entitled to his share of the testamentary part if his father die intestate. *Ibid.*]

[*Judd's Law* does not make money advanced a bar, unless it is an advancement on marriage. *Ibid.*]

So, a term for years assigned to a son by the father. *Semb. 2 Lev. 130.*

So, a gift or present after marriage shall be taken into hotchpot, tho' they are no advancement to bar from a share of the personal estate. *1 Ver. 61.*

A legacy for mourning goes out of the legatory part. *2 Ver. 240.*

So, a devise to a trustee for a daughter. *2 Ver. 754.*

[If a loss happens in a freeman's estate by the insolvency of the executor, it shall be borne wholly out of the testamentary part, and not out of the customary: *Redshaw v. Brasier, T. 1 G. in Can. 2 Ld. Raym. 1328.*]

When an orphan attains his full age, he shall have his proportion with customary interest: *2 Vent. 341.*

Or, if it be a woman, when she marries. *2 Vent. 341.*

Tho' the woman die after marriage before the age of 21 years. *R. 1 Ver. 89.*

So, an orphan shall have his share, tho' his father die within the province of *York*; for the custom of *London* shall be preferred to the custom within the province of *York*. *2 Ver. 48. 82. 111. Vide Chancery, (3 D 3.)*

So, an orphan after 21 may dispose of his orphanage part, tho' it be not received; but not before 21. *Pr. Ch. 537.*

And if he die intestate, it shall be distributed according to the *stat. 22 & 23 Car. 2. c. 10. Pr. Ch. 537.*

So, if he die within age, tho' his orphanage part survives to the other orphans, if he has any part by the death of another orphan as survivor, that shall be distributed. *Pr. Ch. 537.*



But before recovery or receipt by an husband of the share of his wife, who was an orphan, the interest does not vest in him. 2 Vent. 341. R. Ca. Ch. 182.

And he cannot dispose of it by his will. R. 2 Vent. 341.

And if he gives it to the wife in compensation for her dower, his wife shall have her dower, and likewise the money due to her as an orphan. R. Ca. Ch. 182.

[If husband and wife, she being under age, covenant before marriage, in consideration of her portion, to release her orphanage share; if the father dies in the husband's life, he is barred of any customary share in right of his wife; but if the husband is dead, the articles would not bind the wife, and she would by survivorship be entitled to the customary share, as a *chose en action* not recovered by the husband. *Metcalfe v. Ives*, T. 1737. 1 Atkyns, 63.]

[And this covenant of the husband shall be considered in equity as actual release, and so an extinguishment of the wife's right to the orphanage part, and leaves the father's estate as if never charged with it; and therefore must be considered as part of his general personal estate, and not go wholly to his executors as part of the dead man's share. *Ibid.*]

If the husband devise a lease, books, &c. the wife by custom shall have a moiety of the specific legacies, and likewise of the other personal estate. R. 2 Ver. 110.

And the specific legatee shall have no recompence out of his testamentary part. R. 2 Ver. 111.

So, a settlement by a freeman in trust for himself for life, and afterwards to his grandchildren, will be a fraud upon the custom. R. 2 Ver. 612. 635.

Otherwise, if he makes a gift to his grandchildren in his lifetime. 1 Ver. 612.

Or, purchases land in his lifetime. 2 Ver. 612.

Or, gives the whole to one daughter in his lifetime. *Ibid.*

So, a voluntary settlement, by a freeman, of a term, does not bind his wife. R. 2 Lev. 130. 2 Ver. 98.

So, a father, freeman of London, cannot by his will dispose of his personal estate to the prejudice of the customary part of his children, and wife. 1 Lev. 227. R. 1 Ch. R. 84.

[If a freeman of London devises no more than his testamentary part, his children shall have both their legacies and their customary shares; but if he devises his whole estate, they must make their election. *Wilson v. Philips*, P. 1725, *Bunb.* 195.]

[If the daughter of a freeman has 10,000 l. legacy left her by her father, on condition that she renounce her orphanage part, and being told by her brother she may make her election, to have an account of the father's estate, and have her orphanage part, she declares she will accept the legacy, and executes a release; yet if the orphanage part is greatly superior, it shall be supposed she did not rightly understand it, and the release may be set aside. *Pusey v. Desboverie*, T. 1734, 3 P. W. 315.]

[If a freeman by will disposes of all his estate, orphanage and testamentary, and some of his children abide by the custom, others by the will, the shares of the latter shall not go among the other, but shall

accrue to the testator's estate, and go according to the will. *Morris v. Burrows*, T. 1743, 2 *Atkyns*, 627.]

Nor, can he by will direct, that the share of the infant shall not survive, if he dies within age. *R. Wild. cont.* 2 *Vent.* 341.

Or, that if the infant die within age, his share shall go to another. *R. Ca. Ch.* 199. 2 *Vent.* 341.

[A freeman cannot devise either the orphanage part or the contingency of the benefit of survivorship, among orphans; nor can an orphan devise his orphanage part, nor the part which accrued by survivorship; but such freeman may by will give his children legacies inconsistent with the custom, and then they must make their election, to abide by the will, or by the custom; but they cannot abide by the will in part, and have the benefit of the custom also. *Harvey v. Desbouverie*, T. 9 G. 2. C. T. T. 130.]

Yet he may direct by will, that if they all die, the survivor shall have their shares. *R. 1 Lev.* 227. but *Lev. makes a quare.*

So, if an husband, being an orphan, marry a woman with a portion, and die within age, the wife shall not be relieved for any part of the portion of her husband, which by the custom survives. *Semb.* 1 *Ch. R.* 26.

So, if the husband settle an estate upon his wife in lieu of her customary part, he may dispose of it. *R. 1 Ver.* 6.

[If a woman, before marriage with a freeman, accepts of settlement to take effect after his death of part of his personal estate, (without taking notice of custom of *London*,) she is thereby barred of her customary part. *Lewin v. Lewin*, M. 1727, 3 *P. W.* 15.]

[If a wife was divorced *a mensa et thoro* for adultery, she forfeits her right to her moiety, and widow's chamber, tho' entitled thereto by custom of *London*. *Pettifer v. James*, T. 1717, in *Sc. Bunb.* 16.]

If the husband acknowledge a judgment without consideration, to secure money to be paid after his death; this does not prejudice his debts upon simple contract, nor the customary share of his wife or children, but only his legatory part. *R. 2 Ver.* 202.

So, a term for years taken by a freeman upon his purchase of the inheritance, is not part of his personal estate within the custom 2 *Ver.* 57.

The custom shall not be eluded; and therefore, a settlement in fraud of the custom shall be avoided. *Eq. Ca.* 137.

[If A., having three children of age, and two under age, enters into agreement signed by him and the three of age, that if he takes up his freedom of *London*, they release and disclaim all right to his personal estate as freemen's children, it is void. *Morris v. Burroughs*, H. 1737, 1 *Atkyns*, 399.]

[If a freeman, for love and affection, without pecuniary consideration, make a settlement, but still keeps possession and receives the rents, the property continues in him, and is subject to the custom. *Smith v. Fellows*, M. 1740, 2 *Atkyns*, 62.]

[If a father obliges a son, merely for maintenance, and not for advancement in marriage or trade, to release his right to the orphanage share, such release is void; and even tho' he had in his life given him small sums, to the amount of 3 or 400 *l.* *Heron v. Heron*, P. 1741, 2 *Atkyns*, 160.]

[If a freeman assigns over to trustees a leasehold, reserving to himself an estate for life, the trust to commence after his death, it is a fraud on the custom, and the assignment shall be cancelled, and the premises and profits since his death deemed part of his personal estate. *Smith v. Fellows*, T. 1742, 2 *Atkyns*, 377.]

[If a freeman, several years before his death, purchases a leasehold for 40 years in the joint names of himself and wife, it is a fraud on the custom, and the estate shall be applied as the rest of his estate. *Coomes v. Elling*, H. 1747, 3 *Atkyns*, 676.]

[But had it been given to trustees to the separate use of the wife in possession, it had been good. *Semb. ibid.*]

[The funerals of a child dying after the father, shall be paid out of its orphanage share. *Ibid.*]

[If a freeman aged 72, ill of the gout, and two days before his death, by deed of same date with will, assigns part of his personal estate to trustees to the separate use of his daughter, and that she shall not have power to give it to her husband, (whom she had married without consent, but father is reconciled,) and does not deliver the deed to his daughter, it is a testamentary disposition, and a fraud on the custom, and may be disputed by the husband; but he must make a settlement, even if there is a provision for the wife before. *Tomkyns v. Ladbroke*, T. 1755, 2 *Vesey*, 591.]

[By *stat. 11 G. 1. c. 18. s. 17.* any person becoming free of the city, after 1st June 1725, may dispose of his personal estate, to such person or persons, and to such use and uses as he shall think fit; unless he shall before marriage agree by any writing under his hand, in consideration of his marriage, that his personal estate shall be subject to the custom, or unless he shall die intestate; and the personal estate of such person so making such agreement, or so dying intestate, shall be subject to and be distributed and distributable according to the custom of the city.]

(G 3.) *Allowance to an orphan.*] The mayor and aldermen make an allowance to orphans for maintenance, in proportion to their estate. *D. 2 Vent.* 341.

And at their age, or marriage, their estate with interest is paid to the orphans. *2 Vent.* 341.

(G 4.) *Marriage.*] By the custom of *London*, the mayor and aldermen have the care of the marriage of every orphan within their custody.

And if any marry such orphan within the age of 21, without their licence, they shall be fined according to the quality and portion of the orphan, and committed to *Newgate* till payment. *R. 2 Lev.* 32.

Or, at least, shall give bond for the payment.

'Tho' the estate of the husband deserves a larger portion than the orphan had.

And it is sufficient to say, *that he married such an one being an orphan without assent*, tho' it is not said, *that the marriage was within the city.* *R. 2 Lev.* 32.

'Tho' it is not said, *that he had not a reasonable excuse for it*; for that shall not be intended, unless it be shewn. *R. 2 Lev.* 32.

'Tho' it is not said, *that he took her out of the custody of the mayor and*



and aldermen; for she is in their custody wheresoever she is. *R.*  
*2 Lev. 32.*

### (H) Remedy by a Guardian.

#### (H 1.) Right of Ward.

**I**F tenant in *chivalry* die in the homage of the lord, and a stranger enter into the land, or take the body of his heir within age, the lord may have writ of right of ward. *F. N. B. 139. B.*

And he may have it for the land and body together, or for the land, or body by itself. *F. N. B. 139. C.*

So, the lord *paramount* may have it for the land and body of the *mesne*. *F. N. B. 139. E.*

Or, the lord by reason of ward. *F. N. B. 130. D.*

So, a guardian in *focage* may have right of ward for the land and body by reason of ward. *F. N. B. 139. H.*

So, he shall have right of ward for the body in his own right. *F. N. B. 139. H.*

But a guardian in *focage* shall not have right of ward for the land; for he is only bailiff to his ward for the land, and has no right to the land. *F. N. B. 139. H.*

Right of ward may be sued by *justices* in the county, or in *C. B.* *F. N. B. 139. F.*

If it be sued by *justices*, the plaintiff may remove it by *pone* into *C. B.* without cause, and the defendant with cause, as in *replevin*. *F. N. B. 139. G.*

By the *st. Mert. 20 H. 3. 6.* in right of ward the plaintiff shall recover *valorem maritagii*, and the defendant shall be imprisoned till he satisfy the plaintiff for his default, and the king for his trespass. *2 Inst. 90.*

#### (H 2.) Ejectment of Ward.

So, if a guardian be ousted of the body and land of his ward, he may have a writ *de ejectione custodie*. *F. N. B. 140.*

Or, he may have an ejectment for the land only. *F. N. B. 140. A.*

And a guardian in *focage* shall have a writ *de ejectione custodie* for the land, as well as a guardian in *chivalry*. *F. N. B. 140. C.*

So, a grantee of the ward. *F. N. B. 140. B.*

#### (H 3.) Ravishment of Ward.

So, by the *st. W. 2. 35.* a guardian in *chivalry* may have a ravishment of ward, if any one takes the body of his ward. *2 Inst. 439.*

So, a guardian in *focage*, by the equity of *W. 2. 24.* which gives a writ in *consimili casu*, shall have a ravishment of ward. *2 Inst. 439. F. N. B. 140. D.*

So, every ancestor, male or female, shall have a ravishment of ward against him, who wrongfully takes an heir apparent, male or female. *R. 3 Co. 38. b.*

So, an executor shall have it for a ward, which was taken out of the possession of his testator. *11 H. 4. 55. a.*

But it does not lie by a father, for taking and marrying his son after his full age; for then he may marry without the consent of his father. *R. Mar. Pl. 8.*

## (H 4.) Information.

So, by the *st.* 4 & 5 *Ph. & M.* 8. if any above fourteen convey away any woman child unmarried under sixteen, out of the possession and against the will of her father, mother, or such person as shall have by any lawful ways or means the order and governance of her, except it be by or for the master or guardian of such woman child, &c. he shall suffer two years' imprisonment without bail.

And if any woman child, above twelve and under sixteen, consent to a contract of matrimony with any, who so takes her away against the will, or unknowing of her father, or, if he be dead, of her mother, having the custody or governance of her, the next of her kin, to whom the inheritance should descend after her decease, shall enjoy all her lands, tenements, &c. she had at the time of such assent, during the life of him who so contracts matrimony with her.

An information lies upon this statute in *B. R.* as well as in the Star-chamber, or before justices of assize. *R. 2 Lev. 179*

And an information lies, where the woman taken has a real estate, tho' no goods. *R. 2 Lev. 179.*

But it shall not be within this statute, if the son of *B.* to whom the mother intrusts the care of her daughter, marries her in a public manner, without the privity of the mother. *Semb. 3 Mod. 85.*

Or, if he does not use force or craft to compass the marriage. *Semb. 3 Mod. 169.*

Or, if the mother assent at any time, tho' she afterwards disagree. *3 Mod. 169.*

So, an information lies against any person, who takes out of another's custody, and marries his daughter and heir. *R. 1 Sid. 387. 1 Lev. 257. Cro. Car. 557, 558. Dub. 5 Mod. 221. Carth. 385.*

## (H 5.) Trespafs.

So, by the common law, trespafs lies against him, who takes, detains, or marries his ward. *2 Inst. 90.*

So, trespafs lies by every ancestor male, or female, against him who wrongfully takes the heir apparent. *R. 3 Co. 38. b.*

By a father or mother guardian by reason of nurture, against a stranger, who takes the infant from them. *R. Mo. 738.*

And in an action upon the case by a father for the marriage of his son and heir, it is not necessary to say, that he is within age. *Sti. 216.*

Nor, *cujus maritagium ad ipsum pertinet*; for it belongs to him by law. *R. Sti. 216, 217. 303.*

But trespafs does not lie for taking and carrying away a son or daughter who is not heir. *R. Cro. El. 770.*

Nor, for a battery, or imprisonment. *R. Cro. El. 55. 770. Vide Trespafs, (B 5.)*

Nor, an action upon the case for the battery of his heir, being his apprentice, whereby he became decrepit, and the father lost his marriage; for the loss of the marriage of an heir is not a cause of action, except where he is taken and married by a stranger. *R. Cro. El. 55.*

Nor, for the defamation of his daughter, whereby the father loses her marriage. *Cro. El. 770.*

So, an action lies by the father for the marriage of his son and heir, after his full age. *Jon. 411, 412.*

(H 6.)

## (H 6.) Intrusion of Ward.

If the ward himself, during his nonage, had entred upon the land, and ousted the lord, he might have a writ of intrusion of ward against him. *F. N. B.* 141. *A.*

And it lies after the full age of the heir, as well as during his nonage. *F. N. B.* 141. *E.*

(H 7.) *Valore Maritagii.*

So, if the heir had married himself without the assent of the lord, after convenient marriage tendred to him, the lord might have a *valore maritagii* for the value of the marriage. *F. N. B.* 141. *D. F. G.*

For more concerning *Guardian*, vide *Accompt*, (A 2.—E 3.)—*Chancery*, (3 O 1, &c.)—*Copyhold*, (K 5.)—*Prærogative*, (D 26, 27.)—*Prohibition*, (G 20.)—*Wast*, (F 1.)

## GARNISHMENT.

*Vide Abatement*, (I 30.)—*Attachment*.—*Pleader*, (2 X 8, &c.)

## GARRANTY.

## (A) Warranty ; by what Words it shall be.

**A** WARRANTY is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same lands, and to render in value, if they are evicted by a former title. *Co. L.* 365. *a.*

Warranty is exprefs, or implied. *Co. L.* 365. *a.*

No word in law makes an exprefs warranty, except the word *warrantizo*. *Lit. f.* 733.

But a feoffment by the word, *dedi*, implies a warranty to the feoffee and his heirs, during the life of the feoffor. *Co. L.* 384. *a.*

And before the *ſt. quia emptores terrarum*, 18 Ed. 1. 1. if a feoffment was by *dedi tenendum of the feoffor and his heirs*, the heirs as well as the feoffor himself were bound to warranty in respect of the tenure. *Co. L.* 384. *a.*

So, in an exchange, the word *excambium* imports a mutual warranty. *Co. L.* 384. *a.*

So, in a partition, it is implied that the one warrants the other. *Co. L.* 384. *a.*

So, in *homage auncesfrel*, the lord is bound to warrant his tenant. *Co. L.* 384. *a.*

So, if a gift in tail, or lease for life, be by or without deed, rendering rent, the donor, or lessor, is bound to warranty. *Co. L.* 384. *b.*

So, if the heir assign dower, he is bound to warranty. *Co. L.* 384. *b.* 2 *Vol.* 738. *l.* 50.

But, *conceſſi*, does not imply a warranty. *Co. L.* 484. *a.*

So, *dedi*, in letters patent of the king, does not import a warranty ; for the king is not bound to warranty except by exprefs words. 2 *Inst.* 269.

So,



So, a grant, *cum clausulâ warrantie*, these words do not create a warranty. 3 *Roll.* 739. l. 17.

What words make a covenant express, or in law, *vide Covenant*, (A 1, &c.)

### (B) Who are bound by a Warranty.

**A**N express warranty never binds the heir to warranty, unless he be named; as, *ego & heredes mei warrantizabimus*, &c. *Co. L.* 383. b. 384. b.

But an exchange, partition, *homage auncestrel*, which are warranties in law, bind the heir to warranty. *Co. L.* 384. a.

So, if a father and his heir apparent join in a warranty, the heir is doubly bound, by his own warranty and as heir to his father. *R. Mo.* 20.

If two join in a warranty, and the one dies, the heir and the survivor may be vouched. *Mo.* 20.

Or, the survivor alone may be vouched at election. *Mo.* 20.

### (C) To whom a Warranty extends.

**I**F a man warrant land without saying to whom, it shall be intended to the feoffee. *Co. L.* 383. b.

If he warrant to *B.* without more; this extends only for his life, for default of the words, *his heirs*. *Co. L.* 47. a. 384. b.

Tho' he warrant to *B. against him and his heirs*. *Cro. El.* 602.

So, if a man warrant, without saying, *for him and his heirs*, it will be a warranty for his life only. *R. Cro. El.* 602.

But if a man warrant to *B. and his heirs*, the warranty extends to the heirs. *Vide Co. L.* 47. a.

So, *dedi*, extends to the feoffee and his heirs, during the life of the feoffor. *Co. L.* 384. a.

So, an exchange, partition, *homage auncestrel*, import a warranty to the party and his heirs. *Co. L.* 384. a.

So, if there be a feoffment to *A. and his heirs*, and a warranty to him *in forma prædicta*, that extends to his heirs. *Co. L.* 385. b.

So, if a warranty be to *A. and his heirs*, it shall be general against all persons, tho' it does not say, *against all persons*. *R. 2 And.* 118.

So, if a man warrant to *B. his heirs and assigns*, this extends to all assigns and their assigns *toties quoties*, for ever. *Co. L.* 384. b.

If, to *A. and B. & eorum heredibus & assignatis*, it extends to an assignee of the heir of the survivor, &c. *Co. L.* 384. b.

So, it extends to an assignee of part of the land. *Co. L.* 385. a.

So, it extends to an assignee by *parol*. *Co. L.* 385. b.

So, if a feoffee makes a gift in tail, or a lease for life, remainder in fee, the donee or lessee may vouch as assignee; for his estate and the remainder make but one estate. *Co. L.* 385. a.

If there be a feoffment to *A. and B.*, and *A.* assigns his part, *B.* might vouch for his moiety. *Co. L.* 385. a.

If there be a feoffment to three, and one releases to the two others, they may vouch. *Co. L.* 385. a.

If there be a feoffment to *A.* who enfeoffs *B.*, who re-enfeoffs the heir of *A.*, he may vouch as assignee. *Co. L.* 385. b.

But,

But, generally, a warranty does not extend to assigns, unless they are named. *Co. L. 384. b.*

If there be a feoffment to *A. and B. their heirs and assigns*, and one of them assigns, it does not extend to such assignee. *Co. L. 385. b.*

So, a warranty to one, *his heirs and assigns*, does not extend to an assignee of part of the estate; as, if the feoffee makes a gift in tail or a lease for life, the donee or lessee is not an assignee, but he may vouch his donor or lessor, and so take advantage of the warranty. *Co. L. 385. a.*

So, if the donee make a feoffment, the feoffee cannot vouch as assignee, but must vouch his feoffor. *Co. L. 385. a.*

If there be a feoffment to *A.* who enfeoffs *B.*, who re-enfeoffs *A.*, he or his heirs cannot vouch; for he cannot be assignee to himself. *Co. L. 385. b.*

Yet by an exchange, or feoffment with the word, *dedi*, the assignee may rebut, tho' he cannot vouch. *Co. L. 384. b.*

So, if there be a feoffment with warranty, without saying, *to the assigns*, yet an assignee, or any tenant of the land, may rebut. *Co. L. 385. a.*

So, tho' a disseisor, abator, intruder, &c. cannot vouch or have a *warrantia charta*, because he has no privity, yet he may rebut. *Co. L. 385. a.*

So, *cestuy que use* may rebut, tho' he comes in the *post*. *R. Sal. 685.*

But a man who claims *paramount*, and not under the warranty, cannot vouch, or rebut; as, if a feoffment be to two brothers, with warranty to the eldest and his heirs, who dies without issue; the youngest cannot vouch or rebut, for he does not claim as heir, but by the feoffment. *Co. L. 385. a.*

If there be a gift in tail with warranty to the donee, his heirs and assigns, who makes a feoffment and dies without issue; the feoffee cannot vouch or rebut, for the estate to which the warranty was annexed, is determined. *Co. L. 385. a.*

When a covenant binds or extends to heirs or assigns, *vide Covenant*, (B 1, &c.—C 1, &c.)

#### (D) By what Conveyance created.

Warranty may be created by any conveyance of lands, tenements, or hereditaments; as, by fine, feoffment, &c. *Co. L. 371. a.*

By gift in tail, or lease for life. *Co. L. 371.*

By fine *sur grant & render*. *Carth. 141.*

So, by release or confirmation, which enlarges the estate. *Co. L. 371. 385. a.*

So, tho' the release or confirmation pass no estate or right, and the releasor has nothing in the land. *Co. L. 371. b. 385. a.*

And such release, &c. is sufficient for a warranty to the assignee. *Dub. Co. L. 371. b. Acc. Co. L. 385. a.*

So, a warranty in law may be created by will; as, if a man by his will devise land in tail, or for life, rendring rent. *Co. L. 386. a.*

But an express warranty cannot be created without deed. *Co. L. 386. a.*

And therefore, a devise in fee with warranty; the warranty is void, for a will is no deed. *Co. L. 386. a.* [In

[In old conveyances there is a reservation made of such deeds as tend to deraign the warranty paramount. By Ld. Kenyon Ch. J. *Yea v. Field*, B. R. M. 29 Geo. 3. 2 T. R. 709.]

### (E) To what Estates annexed.

**A** Warranty may be annexed to all estates of freehold or inheritance, which pass by livery. *Co. L. 366. a.*

So, to estates incorporeal which lie in grant; as, advowsons, rents, common, *estovers*, &c. *Co. L. 366. a.*

Tho' the rent, &c. be newly created, and was not *in esse* before; for tho' there cannot be a prior title to the rent, there may be to the land, by eviction whereof the rent will be lost. *Co. L. 366. a.*

So, if a rent newly created be given in exchange for land, or for owelty of partition, the warranty in law extends to it. *Co. L. 366. a.*

So, if a rent-seck be released with warranty to the tenant of the land, altho' it enures by way of extinguishment generally, it shall be annexed to it. *Co. L. 366. b.*

But a warranty cannot be annexed to chattels real or personal; for if a man warrants them, the party shall have covenant, or action upon the case. *Co. L. 101. b. 389. a.*

Nor, to the estate of tenant by statute, or *elegit*. *Co. L. 389. a.*

### (F) What Rights, or Titles, are barred by Warranty.

**W**arranty extends to warrant the land in the same plight as it was at the time of the warranty. *Co. L. 388. b.*

And therefore, if any person have an elder right at the time of the warranty, the warranty extends to it. *Co. L. 388. b.*

So, a warranty extends to a rent, common, &c. issuing out of land, which was discharged or suspended at the time of the warranty. *Co. L. 366. b. 388. b.*

As, if the grantee of a rent disseise the terre-tenant and make a feoffment with warranty; that extends to the rent, for it was discharged at the time of the warranty. *Co. L. 388. b.*

So, if the grantee release to the terre-tenant, with warranty of the tenements. *Co. L. 366. b.*

So, a right shall be barr'd tho' it descend in one respect, and the warranty in another; as, if husband and wife sue in right of the wife, they shall be barred by a collateral warranty of the ancestor of the husband. *Co. L. 365. b.*

Or, if a woman, heir of a disseisor, enfeoff with warranty, and afterwards marry the disseisee; in a *præcipe* they shall be barred by the warranty of the woman. *Co. L. 365. b.*

So, a right not *in esse* at the time of the warranty, but future, may be barred by warranty; as, if a father be disseised, and the son release with warranty, tho' he had no right at the time but only *in futuro* upon the death of his father; for otherwise there would be a circuitry of action. *Co. L. 265. a.*

Tho' the warranty and right descend to the heir at the same time; as, if A. tenant for life, remainder to his son, be disseised, release with warranty, and die, the son is barred. *Co. L. 388. b.*

So, tho' the warranty descends first, if the right was *in esse* in any of the ancestors at the time of the descent. *Co. L. 388. a.* So,



So, a right of entry, or action, shall be barred by warranty. *R. Sal. 686.*

## (G) What not.

**B**UT warranty does not extend to naked titles; as, to a title of entry for a condition broken; for that cannot be divested, neither can there be an action for it, and so no *voucher*, or *warrantia chartæ*. *Co. L. 389. a. 379. b.*

So, it does not extend to a title of entry by force of an exchange. *Co. L. 389. a.*

Nor, to a title of entry for *mortmain*, consent to a ravisher, &c. *Co. L. 389. a.*

So, if made by a parcener, &c. upon alienation of his part, it does not extend to avoid the partition. *R. Mo. 21.*

So, a warranty does not extend to a right, which commences after the warranty made. *Co. L. 388. b.*

And therefore, if a son has a rent, common, &c. out of the land of his father, who makes a feoffment with warranty, and afterwards the son is disseised, and the warranty descends; this does not extend to the rent, which was put to a right after the warranty. *Co. L. 388. b.*

So, if a woman who has a rent, &c. intermarry with the terre-tenant to whom *A.* releases with warranty; this does not extend to the demand of rent by the wife, or her heir; for their title of action for it commences after the warranty, *viz.* upon the death of the husband, or wife. *Co. L. 388. b.*

So, if the grantee of a rent grant it to the terre-tenant upon condition, who makes a feoffment with warranty; this does not extend to the rent afterwards claimed for breach of the condition. *Co. L. 389. a.*

If tenant in tail, remainder in tail, levies a fine with warranty, and afterwards suffers an erroneous recovery, and dies without issue; tho' the warranty descends upon him in the remainder, it does not bar him to have error upon the recovery. *Dub. 2 Rol. 741. l. 35.*

So, it does not extend to an estate in reversion, remainder, or possession, which was not divested or put to a right at the time or before the descent of the warranty. *Co. L. 388. b.*

And therefore, if there be tenant for life, remainder or reversion in fee to *A.*, and a collateral ancestor of *A.* release to the tenant for life in fee with warranty, and die, and the warranty descends upon *A.*, his remainder or reversion is not barred, for it was not divested. *Co. L. 388. b.*

So, if the father has land in fee, and the son has a rent, common, &c. out of the land, the father makes a feoffment with warranty; this does not extend to the rent, &c. which was not divested. *Co. L. 388. b.*

So, if the husband make a feoffment, and a collateral ancestor of the wife release with warranty; this does not bar her right of dower, which was not changed from its original essence. *Co. L. 389. a.*

## (H) What Warranties are Bars.

(H 1.) Lineal Warranty; what shall be.

**W**arranties are of three kinds; lineal, collateral, or which commence by *disseisin*. *Lit. f. 697.*

Lineal

Lineal warranty is, where the heir to the warranty would have conveyed his descent to the lands (if there had been no warranty) from the same ancestor, who made the warranty. *Co. L. 370. a.*

As, if a father seised in fee makes a feoffment with warranty, and dies, the warranty will be lineal to his son, for he would have made his descent to the land from his father. *Lit. f. 703.*

So, it will be a lineal warranty, if the heir conveys his descent by means of the ancestor who made the warranty, tho' he does not make his title immediately as heir to him; as, if the grandfather be disseised, and the father release with warranty, and die in the life of the grandfather; his warranty will be lineal to the son, for he claims by means of the father, altho' he makes his title to the grandfather, who was last seised. *Lit. f. 706.*

So, if by possibility the heir could convey his descent by means of such ancestor; as, if the father be disseised, and the eldest son release with warranty, and die in the life of his father; his warranty will be lineal to the youngest son. *Lit. f. 707. 715.*

If *A.* tenant in tail, and his eldest son, make a feoffment with warranty, and the eldest son dies in the life of his father; this warranty is lineal to the youngest son of *A.* *R. Hut. 22.*

So, it will be a lineal warranty, if the heir derive his title from the ancestor who made the warranty, tho' he does not derive from him alone; as, if there be a gift in tail to husband and wife and the heirs of their bodies, and the husband discontinue; the warranty of the husband or the wife is lineal to the issue in tail, tho' he claims as heir of both their bodies. *Lit. f. 714.*

So, if there be a gift to a man and a woman and the heirs of their bodies, who afterwards intermarry; tho' the donces took by moieties. *Co. L. 375. a.*

#### (H 2.) Collateral, what shall be.

But, where the heir to the warranty does not derive his title from the ancestor who made the warranty, it will be a collateral warranty; because his title is collateral. *Lit. f. 704, 705. 717.*

As, if a father disseise his son, and make a feoffment to another with warranty, it will be a collateral warranty; because the son does not derive his title from the father. *Lit. f. 704.*

If the father be disseised, and the youngest son release with warranty, it will be collateral to his eldest brother. *Lit. f. 707, 708.*

So, if tenant in tail discontinue, a release by the uncle with warranty will be collateral to the issue in tail. *Lit. f. 709.*

#### (H 3.) Collateral in Part, and Lineal in Part.

So, the same warranty may be collateral in part, and lineal in part; as, if the eldest daughter enter, and enfeoff *B.* of all the land, which descended to her and her sister, with warranty, and die without issue; the warranty will be collateral for the moiety, which was the part of the youngest sister, and lineal as to the other moiety. *Lit. f. 710.*

So, a warranty, which was collateral to some, may become lineal to others; as, if a man be disseised, and his youngest son release to the disseisor with warranty, it will be collateral to his eldest brother and

and his issue; but if he die without issue, the warranty becomes lineal to the issues of the youngest son himself. *Co. L. 371. b.*

If tenant in tail discontinue, and his middle son release to the discontinuee with warranty, and die without issue; the warranty is collateral to his eldest brother; but if he afterwards die without issue, it is lineal to his youngest brother. *Lit. f. 708.*

(H 4.) When Lineal Warranty shall be a Bar.

By the common law, all warranties, which did not commence by *disseisin*, were bars to the heir upon whom they descended.

And therefore, if a lineal warranty descends upon the heir to a fee-simple, it will be a bar to him without assets. *Lit. f. 711.*

So, a lineal warranty, which descends upon the issue in tail with assets, will be a bar, notwithstanding the *st. de donis*, 13 *Ed. 1.* But this is by an equitable construction of the *st. of Gloc. 3.* *Co. L. 374. Vau. 365.*

But by construction upon the *st. de donis*, a lineal warranty is no bar to the issue in tail, without assets by descent from the same ancestor. *Co. L. 374. Vau. 365. Hut. 22.*

And they ought to be of equal value with the land warranted at the time of the descent. *Co. L. 374. b.*

So, they ought to be assets in fee-simple, and not in tail, or *pur auter vie.* *Co. L. 374. b.*

So, they ought to be lands, or tenements, rents, &c. issuing out of lands, and not personal inheritances. *Co. L. 374. b. Vide Assets.*

(H 5.) When Collateral Warranty shall be a Bar.

By the *st. Gloc. 6 Ed. 1. 3.* warranty of the father tenant by curtesy, either in the life of his wife, or afterwards, with assets, shall be a bar to the heir, who claims the inheritance on the part of his mother. 2 *Inst. 292.*

And before this statute, warranty by tenant by the curtesy was a bar to his heir, without assets. 2 *Inst. 292.*

So, warranty of the father, or mother, tenant for life, since the *st. Gloc. 3.* without assets, will be a bar to the heir; for the statute only remedies in the case of a tenant by the curtesy. 2 *Inst. 292. R. Sal. 685.*

So, warranty of the mother, tenant in dower, till the *st. 11 H. 7. 10. Co. L. 381. 2 Inst. 292.*

So, a donee in tail discontinuing, if his wife after his death release to the discontinuee with warranty, it will be a bar to the issue in tail. *Lit. f. 713.*

So, if a donee in tail, remainder to *A.* his sister in fee, levy a fine with warranty to the use of *D.* and his heirs, and die without issue, *A.* and *B.* his sisters being his heirs; *A.* shall be barred by this warranty for the whole, tho' the warranty descends to *B.* and her. *R. 2 Cro. 217, 218.*

But by the *st. of Gloc. 3.* warranty of the tenant by the curtesy is no bar to the heir, without assets. 2 *Inst. 222. 293.*

So, by the equity of this statute, the warranty of tenant in tail is no bar, unless there be assets in fee-simple descended. 2 *Inst. 293. Vide ante, (H 4.)*

So,



So, if a collateral warranty be annexed to an estate for three lives, (which is good within the *ſt.* 32 *H.* 8. and no discontinuance, but determined by the death of the tenant in tail without issue,) the warranty does not bind after the estate determined. *R. Cro. El.* 602.

And there was a bill to prevent a collateral warranty's being a bar, without assets.

So now, by the *ſt.* 4 *An.* 16. *f.* 21. all warranties by tenant for life made after the 1st day of *Trinity* term 1706, descending on him in reversion or remainder, shall be void.

And all collateral warranties, made after that by any ancestor not in possession, shall be void as to his heir.

### (I) What Warranties are no Bar.

#### (I 1.) Warranty, which commences by *Disseisin*.

**B**UT warranty, which commences by *disseisin*, does not bar the heir upon whom it descends. *Co. L.* 366, 367. *Lit. f.* 698.

As, if the father tenant for years or at will of his son's land, make a feoffment with warranty. *Lit. f.* 698.

Or, if tenant by statute, or *elegit*, make a feoffment. *Ibid.*

Or, guardian in *chivalry*, socage, for nurture, &c. *Lit. f.* 699. *Co. L.* 367. *b.*

So, if a man abate, intrude, &c. into land, and make a feoffment with warranty. *Co. L.* 367. *a.*

If a man enter before the lord by escheat, and make a feoffment with warranty. *Ibid.*

So, if a joint-tenant make a feoffment of the whole, with warranty, it shall be void for a moiety. *Lit. f.* 700.

So, if a *disseisin* be made with intent to make a feoffment, or to have a release with warranty; the warranty will be void, tho' it be not a *disseisin* and warranty together. *Co. L.* 367.

So, if he who makes the warranty be of covin with the disseisor, tho' the *disseisin* is not done immediately to the heir upon whom the warranty descends; as, if a lessee for life, or donee in tail, be disseised, a release with warranty by the ancestor of the lessor, or donor, does not bind, if it was by covin with the disseisor. *Co. L.* 366. *b.*

But if one parcener enters generally, and makes a feoffment of the whole with warranty; this is not a warranty which commences by *disseisin*, and therefore binds the other parcener as to a moiety; for it was no *disseisin* to him who had no seisin, tho' the freehold descended to both, but the feoffment of one of them shews that his entry gave him seisin of the whole. *Co. L.* 374. *a.*

#### (I 2.) If the Warranty does not descend upon him, who claims the Land.

So, if a warranty does not descend upon him, who claims the land to which the warranty was annexed, it will be no bar; as, if tenant in tail of land of the nature of *borough-english* discontinue with warranty, and die, leaving two sons; the youngest son shall not be barred by the warranty, tho' assets descend; because a warranty always descends upon the eldest son, who is heir by the common law. *Lit. f.* 735.

So, if it was a collateral warranty. *Ibid.*

So,

So, if the warranty descends upon the heir, who at the time of the descent of the warranty is an infant, and his entry *congeable*, it is not barred by the warranty, but he may afterwards enter and avoid the estate within, or after his full age. *Co. L. 380. R. 1 Co. 140. a. 1 And. 311.*

So, if a woman, upon whom a warranty descends, be *covert* at the time, and her entry *congeable*. *Co. L. 380. b.*

(I 3.) If the Warranty be defeated.

(I 3.) *By defeat of the estate to which, &c.]* So, a warranty is no bar, if it be defeated; as, if the estate, which a man had at the time of a warranty made to him, be defeated, the warranty is defeated. *Lit. f. 741.*

As, if discontinuee of tenant in tail be disseised, and afterwards he or his ancestor release to the disseisor with warranty, and afterwards the discontinuee enters; the warranty is defeated, and the issue in tail may recover. *Ibid.*

So, if a man by fine warrant to *A.* and his heirs, and the use be declared to *A.* for life, remainder to others in tail; the warranty is defeated by the limitation of the use to several. *R. Mo. 859.*

So, by limitation of a different estate to *A.* from that to which the warranty was granted. *Ibid.*

So, if tenant for life or in tail, remainder to *A.* in tail or fee, be disseised, and the ancestor of *A.* release to the disseisor with warranty, and, before his death, the tenant for life enters; the warranty is defeated. *2 Rol. 740. l. 45. 50.*

(I 4.) *By determination of the estate.]* So, if the estate, which the party had at the time of the warranty, be determined, the warranty will be defeated; as, if the ancestor of him in reversion release to the tenant for life, or for years, with warranty, and afterwards the term determines, or the lessee dies; he in reversion may enter.

So, if *A.* make a lease for life, or years, and his son release to the lessee with warranty, and *A.* dies; after the death of the lessee, or the determination of the years, his son may enter. *2 Rol. 739. l. 40.*

So, tho' there was a release with warranty to the lessee and his heirs; for the warranty cannot enlarge his estate. *2 Rol. 739. l. 35.*

Tho' the release was to the grantee in fee of the lessee who had it for life, remainder to *A.*, remainder to the lessee in fee; for the warranty extends only to the estate which he had at the time of the release. *2 Rol. 739. l. 30.*

So, if the estate of him, upon whom a collateral warranty descends, determines, and another takes the estate to whom the warranty is lineal, his right revives; for the warranty does not give a right but is only a bar to the recovery, and therefore, when a warranty determines, is removed, or defeated, the right revives. *Lit. f. 708. Co. L. 372. a.*

And a warranty does not extinguish the right, but only binds it as long as it stands in force. *R. Sal. 686.*

(I 5.) *When a warranty is not defeated.]* But if an estate be bound by a warranty, and afterwards the estate to which, &c. be defeated as to a particular estate, the warranty shall not be defeated: as, if

tenant for life, remainder to *A.*, be disseised, and an ancestor of *A.* releases to the disseisor with warranty and dies, and afterwards tenant for life enters or recovers; yet the remainder will be bound by the warranty. 2 *Roll.* 740. l. 40.

If husband and wife are tenants for life, remainder to a son in tail, and the husband makes a feoffment with warranty, and dies, and then the wife enters by the *st.* 32 *H.* 8. whereby she is remitted for life; yet the warranty will not be defeated as to the son; for his estate was bound by the warranty before the entry of the wife. 2 *Roll.* 741. l. 5.

If *A.* having nothing in the land levies a fine of it with warranty to *B.*, who devises to *C.*, and *C.* enfeoffs *A.* and his son, and *A.* releases to the son; the warranty is not destroyed. *Jon.* 457.

### (K) How a Man shall take Advantage of a Warranty.

(K 1.) By *Warrantia Charta.*

**A** Man shall take advantage of a warranty by writ of *warrantia charta*, by *voucher*, or by *rebutter*. *Vide Co. L.* 365. a.

When a *warrantia charta* lies, and how the proceedings shall be, *vide in Pleader*, (3 *N* 1, &c.)

(K 2.) By *Voucher.*

So, in an action in which *voucher* lies, a man who has a warranty, being impleaded, may *vocare ad warrantizandum* the person bound to warranty. *Vide Co. L.* 365. a.

In what actions *voucher* lies, and the proceedings upon it, *vide in Voucher*, (A 1, &c.)

(K 3.) By *Rebutter.*

So, if a man who has a warranty, be impleaded by him who made the warranty, or by him upon whom the warranty descends, he may by plea rebut, or repel him, by force of the warranty. *Co. L.* 365. a.

### G A V E L K I N D.

(A) Gavelkind, what shall be; Descent of, and Customs belonging to it, &c.

**G** AVELKIND land, that is, *gave all kind*, is so called, because this custom giveth to all the sons alike. *Co. L.* 140. a. *Vide Somner.* (*Vide Burrough-Englisch.*)

The lands in *Kent* generally are of the nature of gavelkind, which custom there, is like the common law elsewhere. 1 *Sid.* 135. 138.

By the *st.* 18 *H.* 6. it is recited, that not above 30 or 40 persons at most had any lands in *Kent*, which were not gavelkind, the greatest part or well nigh all that county being of that tenure.

And this custom obtains in *North Wales*, and other places. *Lit. f.* 265. *Co. L.* 175. b. *Vide Parceners* (B).

And



And it was general in *Wales* till the time of *H. 8.* *Pl. Com.* 129. b. *Dy.* 363. b.

Land of the nature of gavelkind is held by the service of socage, and not of *chivalry*. *Cro. Car.* 561. 1 *Sid.* 138.

And therefore the *st. 31 H. 8. 3.* which disgavels lands in *Kent*, whereof 34 persons there named were seised in fee or tail, says, that those lands shall descend as lands never holden in socage, but always held by knight's service descend.

Yet gavelkind land may be held of a manor holden by knight's service.

And if the gavelkind land escheat, whereby it will be held in *chivalry*, yet the custom is not thereby destroyed, when it shall be severed. *Per Twissd.* 1 *Sid.* 138. *Semb. Cro. Car.* 562.

So, if it descend to the king, tho' it be privileged in the hands of the king, the custom is not thereby destroyed. *Per Twissd.* 1 *Sid.* 138. *Semb. Pl. Com.* 234. b. 247. a.

So, if the king be seised of lands in the nature of gavelkind, and die, having several sons; the whole descends to the king his successor, and the younger sons shall have no part; for the custom is suspended in the hands of the king. *Cont. per Southcot, Pl. Com.* 234. b. *Acc. per Moile, Pl. Com.* 247. a.

If the king's ancestor die seised of lands in gavelkind, and the king has a brother, the land descends to the king and his brother. *Pl. Com.* 247. a.

By the *st. 31 H. 8. 3.* the lands of which 34, viz. the Lords Cromwell, Burgh, Cobham, Windsor, Sir Thomas Cheine, Sir Christopher Hales, Sir Thomas Willoughby, Sir Anthony St. Leger, Sir Edward Wotton, Sir Edward Bowerton, Sir Roger Cholmly, Sir John Chamneys, John Baker, Reynold Scott, John Guldford, Thomas Kemp, Edward Thwaites, William Roper, Anthony Sands, Edward Isaac Percival Hart, Edward Monyns, William Whetnall, John Fogg, Edmund Fettiplace, Thomas Hardres, William Waller, Thomas Willford, Thomas Moile, Thomas Herlakenden, Geoffry Lee, James Hales, Henry Hussy, and Thomas Royden, were seised in fee or in tail, shall be disgavelled.

Land of the nature of gavelkind descends to all the sons equally. *Co. L.* 140. a.

And if there be no issue male, to all the daughters. *Som.* 7.

And if there be no issue, to all the brothers. *Semb. Co. L.* 140. a. *Som.* 7.

If one son die in the life of his father, having issue a daughter, it shall descend to the other son and the daughter. 1 *Sal.* 243. *Som.* 7.

So, if a brother die having issue, the descent shall be to all the brothers and the nephew. *Som.* 7.

So, if a rent be issuing out of land of the nature of gavelkind, that shall descend to all the sons; for it follows the nature of the land.

*R. 2 Lev.* 87. 1 *Mod.* 97. 1 *Ver.* 487.

But if land of the nature of gavelkind be granted with warranty or upon condition, the warranty or condition descends to the heir by the common law. 1 *Mod.* 96. *Lit. f.* 736. *Co. L.* 376.

So, by the custom of gavelkind, the descent shall not be to all the sons and daughters; for females do not take with males. *St. Prar. Reg.* 17 *Ed.* 2. 16.

[The adverse possession of one tenant in gavelkind does not operate as the possession of both. 1 Bl. Rep. 678.]

So, other customs are incident to lands of the nature of gavelkind; as, that the owner may devise them. Cro. Car. 562.

[If a man devise gavelkind lands to trustees, and directs them to convey them to the use of his daughter for life, for her sole use, and after her death in trust for the heirs of her body for ever, the lands shall go according to the rules of common law, and not according to the custom of gavelkind, this being an executory devise. Roberts v. Dixwell, M. 1738, 1 Atkyns, 607.]

So, he may alien them at his age of 15 years. Bend. pl. 52.

Tho' he has only the reversion. Ibid.

Tho' they are of his own purchase. Ibid.

So, upon his sale he may make a feoffment, and it will be good. Ibid.

But a feoffment, or alienation within age, unless it be for a sale, is not allowed by the custom. Ibid.

Nor, a feoffment, where he has only the reversion. Ibid.

Or, where he himself purchased the same lands within age. Ibid.

Or, a feoffment by him, who has only an estate-tail. R. 2 Cro. 80.

So, by the custom of Kent, the husband shall be tenant by the curtesy, tho' he has no issue. Co. L. 30. a. 111. a.

The wife shall be endowed of a moiety, *quamdiu vidua & casta vixerit*. F. N. B. 150. O. R. 1 Leo. 133. Cro. El. 121. Cro. Car. 562. 1 Sid. 77. Vide ff. Prer. Reg. 17 Ed. 2. 16. 1 Rol. 558. B. Co. L. 33. b. 111. a.

And she cannot waive her dower by the custom, and take it according to the common law. R. 1 Leo. 62. D. Cro. El. 121. R. Cro. El. 825. R. Mo. 260. Co. L. 33. b.

And if the plaintiff demands dower at the common law, it is a bar to say, that the land is gavelkind, whercof the plaintiff ought to be endowed of a moiety *dum sola*. R. 1 Leo. 133.

So, gavelkind land is not forfeited by an attainder of felony; for the rule is, *the father to the bough, the son to the plough*. Dy. 310. b. St. Prer. Reg. 17 Ed. 2. 16.

Yet the custom does not prevail, if the father be outlawed or abjured; for it shall be taken strictly. Dy. 310. b. in marg.

But these customs are collateral, and therefore not lost if the land is disgavelled. Semb. 1 Sid. 77. Cro. Car. 562. R. 1 Sid. 137. Ray. 76. 1 Lev. 79. Hard. 325.

If land be of the nature of gavelkind, it is sufficient only to mention in pleading, that it is gavelkind, without a prescription for it. Co. L. 175. b. Cro. Car. 562. 1 Sid. 77. 138.

But it ought to be mentioned in pleading, that it is gavelkind; otherwise it shall not be intended, tho' the land lies in Kent. Co. L. 175. b. R. Lut. 754.

So, in a special verdict. Lut. 754.

So, in collateral customs, which belong to gavelkind land, in pleading, a prescription must be made for them: as, to devise to have a moiety *dum casta*, &c. for dower, &c. Semb. Cro. Car. 562. 1 Sid. 77. Ray. 76. R. 1 Sid. 148. 1 Lev. 80.

So, land of the nature of gavelkind has fealty incident: and therefore,

fore, every tenant in gavelkind shall do fealty to his lord. *Wright's Introd. to the Law of Tenures*, 210.

And must do suit of court. *Wri. Int.* 210.

## GENTLEMAN.

*Vide Dignity*, (B 9.)

## GLEBE.

*Vide Dismes*, (B 2.)

## GOLD AND SILVER MINES.

*Vide Grant*, (G 7.)—*Waife*, (H 1.)

## GOODS AND CHATTELS.

*Vide Admiralty*, (E 9.)—*Biens, per Totum*.—*Chancery*, (4 W 5.)—*Trespass*, (A 1.—B 4.)

## GRAND CAPE.

*Vide Process*, (D 4.)

## GRAND SERJEANTY.

*Vide Homage* (F).

## GRANT.

[IT is not necessary that the word *grant* should be used in a grant, it being sufficient if the intention to grant be manifested by a deed; therefore the words, *limit and appoint*, in a deed, may operate as words of *grant*, so as to pass a reversion. *Shove v. Pincke*, B.R. H. 33 Geo. 3. 5 T. R. 124.]

As to the premises in a grant, *vide in Fait*, (E 3, 4.)

As to the *habendum*, *vide in Fait*, (E 9, 10.)

As to an exception, or indorsement, *vide in Fait*, (E 2. 5, &c.)

As to the exposition of the covenants, or words of a grant, *vide in Covenant*, (D 1, 2.)—*Devise*, (N 1, &c.)—*Parols*, (A 18, &c.)

## (A) Who may be a Grantor.

TO every grant there must be a grantor, grantee, and thing to be granted. *Dy. 49. a. Perk. 1.*

A grantor is the king, or a subject; a person natural or politic.

Every common person being *sui juris*, *indigena*, of sane memory, of full age, has capacity to make a grant. *Vide Capacity*, (C—D 1, &c.)

If an act of parliament enable the city of *London* to dispose of an office, it may make a grant of it. *Hard. 48.*



So, the king, as well as a common person, may make a grant. *Vide post.* (G 1, &c.)

But a person professed in religion, attainted, or *covert-baron*, alien, *non compos*, or infant, cannot make a grant, except in special cases. *Vide Capacity*, (D 1, &c.)

(A 2.) By what Name.

The grantor and grantee, regularly, ought to be named by the christian and surname. *Vide Capacity*, (B 4, 5.)—*Devise* (I—K).—*Fait*, (E 3.)

Or, by the name of confirmation.

But it is enough, if there be a sufficient description of the grantor or grantee, whereby he may be known; as, by his name of dignity, or office. *Vide Capacity*, (B 4, 5.)

Tho' his addition be omitted, or mistaken. *Vide Fait*, (E 3.)

Tho' the addition be not true.

Yet the person described ought then to be *in rerum natura*. *Vide post.* (B 1.)—*Capacity*, (B 4, 5.)

And a mistake of the christian name shall not be supplied. *Vide Fait*, (E 3.)

(A 3.) When the Grant shall be void.

A grant by a person professed in religion, who is *civiliter mortuus*, will be void.

So, a grant or contract by a *feme-covert*, without the assent of her husband. *Vide Baron and Feme* (Q.).

So, a grant, or contract by an infant, which does not take effect by the delivery from his hand. *Vide Infant*, (C 2.)

*Vide post.* (E 14.)

(B 1.) Who may be a Grantee.

SO, every person *in esse* at the time, and not professed in religion, may take by grant. *Vide Capacity*, (A 1, 2.—B 1, &c.)

Tho' it be a *feme-covert*, or infant. *Vide Baron and Feme*, (P 2.)—*Infant*, (B 1.)

Tho' he be an alien, person attainted for treason or felony, or clerk convict. *Perk. Grant*, 48. *Vide Alien*, (C 2.)

Tho' he be villein to the king, or a common person. *Perk. Grant*, 48.

A person outlawed, or in prison. *Ibid.*

Bastard, excommunicated, or *non compos*. *Perk. Grant*, 48. 51.

But a person not *in esse* at the time of the grant cannot be a grantee; as, if a grant be to the right heirs of B. who is then alive. *Perk. Grant*, 52.

Yet a grant to a person uncertain may be good, if it be ascertained in the life of the grantor; as, a grant to him who shall come first to *St. Paul's* the next day, if the grantor does not die before any one comes there; for if any one capable come there, he shall take. *Perk. Grant*, 56.

(B 2.) When a Grantee is not necessary.

But the king may make a grant by way of ordinance, without nam-  
ing

ing any grantee : as, he may appoint, and such and such men be incorporated. 2 *Rol.* 197. l. 30. 50.

So, the king may grant a fair, market, forest, warren, chase, &c. to be erected, without granting it to any one. 2 *Rol.* 197. l. 47.

### (C) What Things may be granted.

A present Estate, or Interest in Lands, Franchises, &c.

**E**VERY one, who has a present estate, or interest in lands and tenements may grant it. *Vide Assignment* (A).

Tho' it cannot take effect in possession till a future time. *Vide Assignment* (A).

So, every one may grant things incorporeal, and not manurable, which properly lie in grant : as, a rent, common advowson, &c.

Tho' it be only a franchise, or privilege : as, the grantee of a fair, or market, may grant it to another. 2 *Rol.* 46. l. 15.

So, the grantee of common of pasture. 2 *Rol.* 45. l. 46.

So, the grantee of common *sans nombre* in fee. 2 *Rol.* 46. l. 1. 3. 2 *Rol.* 73.

The grantee of a warren in fee. 2 *Rol.* 46. l. 12.

Tho' the interest be accompanied with a trust : as, guardian in chivalry, or socage, may grant his guardianship. 2 *Rol.* 46. H.

So, the grantee of a corody certain. 2 *Rol.* 45. l. 49.

The grantee of the next avoidance. 2 *Rol.* 45. l. 35.

So, the grantee of an annuity, *pro consilio impenso* & *impendendo*, made to him and his assigns, may grant it to another. R. 7 Co. 28. b.

So, if the estate or interest in the thing granted be certain, the grant will be good, tho' the thing itself is contingent and uncertain : as, if the lessor grant to the lessee all the emblements, which he shall have at the end of his term, it will be good ; for he has an interest in all that will be, tho' it be uncertain whether any will be. R. 2 *Rol.* 48. l. 5. *Hob.* 132.

Or, all fruits which grow annually upon such land. 2 *Rol.* 48. l. 10. *Hob.* 132.

So, if a parson grant all the tithes of wool which shall arise in such a year, tho' perhaps none will arise. 2 *Rol.* 48. l. 20. *Hob.* 132.

So, a grant, that if a tenant die, his heir within age, he shall not be in ward. 3 *Leo.* 154.

That there shall be a discharge for his house, when the clergy grant tithes to the king. 3 *Leo.* 154.

Or, that he shall not be collector. *Ibid.*

### (D) What cannot be granted.

A *Chose en Action*, Right, Possibility, &c.

**B**UT a grant of a *chose en action*, bare right, or possibility, will be void. *Vide Assignment*, (C 1, 2, 3.)

So, a personal privilege cannot be granted over to another : as, if a man lend his horse to another to ride to Y, he cannot lend him to another. 2 *Rol.* 46. l. 7.

If a way be granted to A. for his life, he cannot grant it to another. 2 *Rol.* 46. l. 10.

So, a thing uncertain cannot be granted: as, if *A.* has a corody uncertain, he cannot grant it to another. 2 *Rol.* 45. l. 48. 50.

If he has a common *sans nombre* for life or years. 2 *Rol.* 46. l. 3. 2 *Rol.* 73.

Or, *estovers* uncertain. 2 *Rol.* 46. l. 5.

If *A.* holds three acres by fealty and rent, and the lord grant the services of one of the acres, it is void. *Perk. Grant*, 67.

Or, three joint-tenants hold, &c. and the lord grant the services of one of them. *Perk. Grant*, 68.

So, a man cannot grant a thing which he has not, tho' he afterwards possess it: as, if he grant a rent out of land, and afterwards purchase the same land, the grant is void. *Perk. Grant*, 65.

So, a grant of the wool of all the sheep that he ever shall have, is void. 2 *Rol.* 48. l. 22. *Hob.* 132.

If there be a lessee of sheep for two years, the lessor cannot grant them during the term. 1 *Leo.* 43.

So, if the lessee covenant to leave so many sheep at the end of his term, the lessor cannot grant them before the term ends; for there is no property in him. *R.* 1 *Leo.* 42.

But a grant by fine executory will be good, if he afterwards purchase, tho' he had it not at the time of the grant: as, if he grant a reversion by fine, and afterwards purchase it, the grantee after the death of the tenant for life may execute it by *scire facias*. *Perk. Grant*, 66.

### (E) By what Names Things shall pass in Grants.

#### (E 1.) What passes by a Grant of an Hereditament.

**H**ereditament is a very extensive word, whereby every thing passes which may be inherited, corporeal, or incorporeal, real, personal, or mixt. *Co. L. 6. a.* *Vide Fait*, (E 4.) — *Devise*, (N 2, 3.)

As, a rent, common, piscary, &c. in gross. 2 *Rol.* 186. l. 5.

An advowson, rectory, parsonage, &c. *R. Dy.* 351. a.

#### (E 2.) Tenement.

*Tenement* is an extensive word, whereby all lands and inheritances, which may be held, pass. *Co. L. 6. a.* 1 *Leo.* 188.

[The office of marshal of *B. R.* is a tenement, and he is qualified by it to act as commissioner of land-tax. *Sone v. Ashton*, *H.* 2 *G.* 3. 3 *B. M.* 1287.]

And also offices, commons, rents, profits à prendre out of land, and every thing whereof a man may be seised *ut de libero tenemento*. *Co. L. 6. a.*

And therefore, by a grant of all his lands and tenements, a reversion passes. 2 *Rol.* 57. l. 10.

So, a common, tho' it be in gross. *Dub.* 2 *Rol.* 57. l. 5. 7.

A rent-charge. *R.* 2 *Rol.* 57. l. 15.

But a common, way, &c. not appendant or appurtenant to tenements, do not pass. *Semb.* 2 *Rol.* 57. l. 7. 12.

#### (E 3.) Land.

*Terra est nomen generalissimum*, and comprehends all species of land,



as meadow, pasture, wood, moor, water, marsh, furze, and heath, &c. *Co. L. 4. a. R. 1 Rol. 19.*

And it includes castles, houses, and other buildings erected upon the land. *Co. L. 4. a. 2 Rol. 265.*

And therefore, if a man grant all his lands in *D.* his houses there pass. *2 Rol. 57. l. 17.*

So, if he has an house in *A.*, and houses and lands in *B.*, and devises his house in *A.* to one, and (having demised the houses and lands to *D.* rendring rent) all those his lands, meadow, and pasture in *B.* to another, his houses there pass by the word *lands*, tho' he mentions his house in *A.* expressly. *R. 2 Rol. 57. l. 20.*

If a man let his land, open mines in it pass. *2 Lev. 185.*

If he let the mines in his land, and there are any open mines, they pass, but not mines which are not open. *R. 2 Lev. 185.*

If he let the land with all the mines in it, and none are open, he may open new mines. *2 Lev. 185.*

So, if a man grant his lands, all profits within the bowels of the land pass:

As, mines of tin, lead, iron, coal, &c. *Co. L. 4. a. 14 H. 8. f.*

So, all profits upon the land; for *cujus est solum, ejus est usque ad cælum.* *Co. L. 4. a.*

And therefore, water upon the land, and fish and a piscary in it pass. *Co. L. 4. a.*

So, if a man demise the herbage of his woods, tho' the soil does not pass thereby, yet if he afterwards grant all his land in the tenure or occupation of the lessee, the wood passes. *Co. L. 4. b.*

#### (E 4.) By the Grant of a Seignior, or General Words.

As to the grant of a seignior, *vide Seignior.*

By the grant of an honour, divers manors, lands, &c. may pass. *Co. L. 5. a. Vide Honour.*

So, by the grant of an isle. *Co. L. 5. a.*

Or, a town. *Co. L. 5. a.*

Or, a castle. *Co. L. 5. a.*

Or, a knight's fee. *Co. L. 5. a. 2 Rol. 1. l. 32.*

By the grant of a manor, a castle, lands, liberties, &c. may pass. *Co. L. 5. a. Vide Copyhold, (Q 1, &c.)*

So, a reputed manor. *R. 2 Rol. 45. E. Sav. 113.*

So, by the grant of a farm, houses, lands, and tenements may pass. *Co. L. 5. a.*

So, by a grant *de virgata, carucata, bovata terra, &c.* *Co. L. 5. a.*

By the grant of a grange, not only the house for storing of corn, &c. but barns, stables, sties, &c. necessary for beasts, husbandry, &c. and the curtilage, and close where they are situated, pass. *Co. L. 5. a.*

#### (E 5.) By what Words the Soil passes.

So, if a man grant *prata sua*, the land itself passes. *Co. L. 4. b.*

Or, *pasturas suas.* *Co. L. 4. b.*

Or, *brueras suas*, the soil, where heath grows, passes. *Co. L. 4. b.*

So, by a grant of *joncarias suas*, the soil where rushes grow. *Co. L. 5. a.*

By a grant of *ruscarias suas*, the soil where broom grows. *Co. L. 5. a.*

By

By the grant of a marsh, *mora, jumpna*, &c. the soil of that nature passes. *Co. L. 5. a.*

By the grant of a manor for three crops and all profits, the manor passes. *2 Rol. 57. l. 40.*

By the grant of a park the soil passes: for he cannot have it *in alieno solo*. *2 Rol. 60. l. 3.*

So, if a man grant *omnes boscos suos*, the land as well as the wood passes. *Co. L. 4. b.*

Tho' he says, *omnes boscos crescentes*. *Co. L. 4. b. R. 5 Co. 11. a. Cro. El. 522. 2 Rol. 455. l. 15.*

Wood, underwood, coppices, and hedge-rows. *R. 2 Cro. 487. 2 Rol. 455. l. 20.*

So, by the grant of a forest, chase, vivary, or warren in his own land, the soil, as well as the privilege there, passes. *Co. L. 5. b. Vide Chase.*

So, if he grant the profits of his land, the land itself passes. *Co. L. 4. b.*

So, if he grant a boilery of salt, the land passes; for that is the whole profit. *Co. L. 4. b.*

Or, a mine of lead, &c. *Co. L. 6. a. Vide Waife.*

If he grant *firmam* of his tenants at will *manerii sui de B.*, the lands of the tenants pass. *Per Clerks in Duchy, Welsh cont. 3 Leo. 12.*

By a grant of the herbage or vesture of his land, the soil does not pass; for tho' he may have trespass *quare clausum fregit*, yet he shall have only the corn, grass, &c. and not houses, trees, mines, &c. which are fixt to the soil. *Co. L. 4. b. Dal. 47.*

So, by the grant of a liberty to dig turf, the soil does not pass. *Co. L. 4. b.*

By the grant of a piscary, the soil, or water, does not pass. *Co. L. 4. b.*

By a grant of water, the soil does not pass. *Co. L. 4. b.*

Nor, if a man grant *pascua sua*; for the pasturage only passes. *Semb. Co. L. 4. b.*

If he grant *viginti acras saliceti, fraxineti, lupuliceti*, &c. the wood growing only passes. *Semb. Co. L. 4. b.*

If a man let his warren, the soil does not pass. *2 Rol. 59. l. 55. 60. l. 7.*

So, a grant of all saleable woods growing, does not pass the soil. *R. 2 Cro. 524.*

Or, all the great wood, *viz.* oaks, ashes, &c. for the *viz.* explains what wood is intended. *2 Rol. 455. l. 10.*

Or, all timber trees; for nothing passes except the trees, and so much of the soil as is requisite for their growing. *2 Cro. 487. 2 Rol. 455. l. 20.*

#### (E 6.) What passes by the Grant of a Messuage.

So, by the grant of a messuage, or house, the garden, orchard, and curtilage pass. *Co. L. 5. b. R. Cro. El. 89.*

And an acre of land or more may pass by the name of an house. *Co. L. 5. b.*

So, by the name of a messuage, a church is comprised. *Semb. 1 Sal. 256.*

By the grant of a messuage *prout includitur aquis*, the soil of the moats pass. *2 Rol. 50. l. 25.* But,

But, but by the devise of an house, (and not called messuage,) without saying, *cum pertinentiis*, the garden and curtilage do not pass. 2 *Ca. Ch.* 27. *Vide Cro. El.* 89.

(E 7.) By the Grant of a Curtilage.

So, by the grant of a curtilage, the house passes. 2 *Rol.* 1. l. 30.

(E 8.) By a Grant of Pannage.

So, by the grant of pannage, the mast of the trees passes, not the trees themselves. *Per two J. Dal.* 47.

(E 9.) By a Grant *cum Pertinentiis*.

So, by the grant of a messuage *cum pertinentiis*, the orchard, garden, yards, and curtilage pass. 2 *Cro.* 526. X

So, every thing appendant or appurtenant, as common, turbary, flowers, &c. passes by a grant of the land to which, &c. *cum pertinentiis*. *R.* 3 *Lev.* 165.

So, by the grant of a messuage *cum terris pertinentiis*, land occupied continually with the house passes, tho' land is not properly appurtenant to an house. *R. Pl. Com.* 170.

So, by the demise of an house *cum pertinentiis*, a shop annexed to it for thirty years, and reputed parcel, passes. *Semb. Cro. Car.* 17. X

Tho' it be a demise, or grant of the king. *R. Cro. Car.* 169.

So, by a devise of land in *N.* with all lands belonging, two acres four miles distant, continually enjoyed with it, pass. *Adm. Cro. Car.* 57. *Vide infra.*

By the devise of a tenement *cum pertinentiis* in which *N.* inhabited in *A.*, lands always used with it pass, tho' out of *A.* *R. Cro. El.* 113. X

So, by the devise of an house *cum pertinentiis*, the land passes, when the instruction was, to devise all the lands as well as the house. *R. Cro. El.* 114.

So, if the land was used with it. *R. Cro. El.* 704.

By the grant of a manor *cum pertinentiis*, every thing reputed parcel of the manor passes. *R.* 6 *Co.* 39. *R.* 1 *Sid.* 190.

By the grant of a messuage *cum pertinentiis*, a conduit with water pipes to it, enjoyed any time, passes. *R.* 2 *Cro.* 121. *Mo.* 682.

Tho' erected by a lessee, and the lessor occupies them together. *R.* 2 *Cro.* 122.

So, if he grants the land, (excepting the house,) the conduits are excepted. 2 *Cro.* 121.

By the grant of a chapel *cum pertinentiis*, tithes appendant pass. 2 *Rol.* 151.

But by the grant of an house, or land, *cum pertinentiis*, another house, or land, does not pass, unless it be found to be parcel. *R.* 1 *Lev.* 131.

As, by the grant of a mill *cum pertinentiis*, the close where the mill is, or the kiln there does not pass, without more. *R.* 1 *Sid.* 211.

1 *Lev.* 131.

So, by the grant of a messuage *cum pertinentiis*, a shop annexed to it for thirty years does not pass, unless it be found to be parcel. *R. Cro. Car.* 17.

By a devise of land in *N.* *cum pertinentiis*, two acres four miles distant



distant enjoyed with it, do not pass. *R. Cro. Car. 57. Hutt. 35. Vide supra.*

Nor, by a devise of a copyhold messuage *cum pertinentiis*, can freehold land pass with it, tho' used with it. *R. Cro. El. 704.*

So, by the surrender of a copyhold messuage *cum pertinentiis*, copyhold lands appurtenant do not pass. *R. 2 Cro. 526.*

So, by the grant of an house *cum pertinentiis*, a conduit erected by a lessee, disseisor, &c. and never enjoyed with the house by the lessor, disseisee, &c. does not pass. *2 Cro. 122.*

So, by the grant of a manor *cum pertinentiis*, a forest, parcel of the manor, does not pass.

(E 10.) What passes as Parcel, &c.

In the grant of a common person of all lands, &c. *antehac cognit. accept.* or reputed as parcel, &c. land, wood, &c. which was parcel *quocunque tempore praterito*, will be included. *Dy. 362. 2 Rol. 186. 1. 20. Co. Ent. 2. Mod. 69.*

If they were enjoyed together for a convenient time. *Mo. 190.*

If they were purchased and used together and reputed parcel only for two years; for a small time is sufficient to make a reputation. *R. Cro. Car. 308.*

So, in a grant of the king, if they were used and demised together for a convenient time. *R. Cro. Car. 169.*

If by rentals, records, &c. it be reputed parcel, tho' in truth it be not. *R. Sav. 26.*

So, if there be a fine or recovery of a manor *cum pertinentiis*, lands reputed parcel for eighty years pass. *R. 1 Lev. 27.*

But a grant of the king with all lands, woods, &c. *antehac parcell.* extends only to things parcel in a convenient time, as within seventeen or twenty years, according to the nature of the thing. *Semb. Co. Ent. 384.*

So, if a manor be granted, and all woods, parcel, &c. and the manor does not pass for default for livery, &c. the wood does not pass. *Sav. 63.*

So, if one convey a rectory and all tithes, &c. to the rectory belonging, if the rectory does not pass for defect of livery, &c. the tithes, tho' they lie in grant, do not pass. *Sav. 63.*

(E 11.) What, as incident.

So, by a grant of any thing, another thing which is incident passes: as, if the lord grant the homage of his tenant, who holds by homage and fealty, the fealty passes as incident. *Perk. Grant, 112.*

Or, if he holds by fealty and rent, and the lord grant the rent. *Perk. Grant, 113. Co. L. 151. a.*

So, if he holds as of the honour of his castle by castle-guard; if the lord grant the castle, the service passes as incident. *2 Rol. 59. l. 25.*

So, if a man grant the reversion, the rent passes as incident. *Perk. Grant, 113.*

If there be a grant of land *cum pertinentiis*, a common, &c. passes as incident. *1 H. 4. 5. a.*

Tho' it be in the king's grant. *1 H. 4. 5. a.*

So, by the grant of a parsonage, the patronage of the vicarage passes as incident. *2 Rol. 50. l. 32.*

So, a corody as incident to a patronage. 2 *Rol.* 59. 1. 52. 1 *H.* 4.

5. a.

So, a thing appendant or appurtenant passes by a grant of the thing to which, &c. as incident, without saying *cum pertinentiis*. *Co. L.*

307. a. *Cont. Cro. El.* 18.

So, if a rent be granted with a *nomine pæna*, by a devise of the rent, the *nomine pæna* passes. *Per two J. Cro. El.* 895.

So, by the grant of an house, the curtilage passes. *R. Cro. El.* 89. *Vide ante*, (E 6.)

So, by the grant of any thing, *conceditur et id sine quo res ipsa haberi non debet*: as, if one grant his trees, the grantee may enter upon his land, for the cutting down and carrying them away. *Pl. Com.* 16. a.

But if the incident be separable, it does not pass by a grant of the thing to which it is incident, if it be excepted; as, if the lord grant a rent, except or saving the fealty, the fealty does not pass. *Co. L.*

151. a. *Perk. Grant*, 113.

So, if a man grant a reversion saving the rent. *Perk. Grant*, 113.

So, by the grant of any thing, a liberty which was convenient shall not be granted as incident, unless it be of necessity; as, if *A.* grant his fish in such a water, the grantee cannot dig a trench for letting out the water; for he may take them by a net. *Pl. Com.* 16. a.

So, if he grant his land and all his trees, mines open, and not open, in it; tho' he may open mines, he cannot cut down trees for the working and use of the mines. *R. Hob.* 234.

Tho' the mines were open, and the lessor used the trees for them. *Hob.* 234.

#### (E 12.) The Extent of a Grant.

[Ancient grants must be expounded according to what the law was at the time of making them. *Co. Lit.* 8. b. *Ambler*, 288.]

A grant shall be extended to every thing comprised within the words, tho' they are not regularly described in the deed; as, if *A.* grant his manor of *D. in com. N.*, and all his land in *England*, parcel of the same manor; all lands parcel of the manor pass, tho' they do not lie in the county of *N.* *R.* 1 *Rol.* 407.

If one demise a garden-plot to *A.* and afterwards to *B.*, who builds an house upon part, and afterwards the lessor grants *totam illam peciam fundi five* garden-plot *nuper in tenurâ A. & nunc in tenurâ B.*, the reversion of the house as well as the garden passes. *R.* 2 *Rol.* 261. 265. 267.

But if a man bargain all his wood and underwood upon such land being, to have for the life of *B.*, rendring 10*l.* per ann. if the grantee cut down the whole wood at once, he shall not cut it down afterwards, tho' it be granted for the life of *B.* under an annual rent. *R.* 3 *Leo.* 7. *Mo.* 15.

#### (E 13.) When confined to the Tenure, &c. of such an one.

If a man grant a tenement *vocat D. in tenura five occupatione B.*, all lands of that name, tho' part of them are demised to him, and part enjoyed by him without lease, pass; for both are in his occupation. *R.* 1 *Rol.* 19.

Tho' part be wood inclosed adjoining to the land demised, but, by reason

reason of fences being thrown down, the beasts of *B.* have the herbage of the wood; for if he has the occupation by right or by wrong, it is sufficient. *R. 1 Rol. 19, 20.*

If a man grant land by name, in the tenure of *A.* and lately demised to *B.*, in the parish of *D.*, land so named in the tenure of *A.* passes, tho' never demised to *B.*, nor in the parish of *D.* *Semb. 3 Leo. 162.*

If he grant all tithes, which belong to the rectory of *B.*, all which were in the tenure of *D.*, tithes belonging to the rectory pass, tho' never in the tenure of *D.*, for there was a plain and certain description of them before. *R. Jon. 437.*

But by a grant of the manor of *B.* and all lands in tenure *A.* lately demised to *C.*, in the parish of *D.*, land in tenure *A.*, if never demised to *C.* nor in the parish of *D.*, does not pass. *R. 3 Leo. 162. 1 And. 148.*

If a man declare the uses of a fine or recovery of lands in *E.* and *F.*, as to all that farm and the lands belonging called *Vines* in *E.*, and twenty-one acres of the same farm lie in *F.*, those do not pass; for with without the last words, which are restrictive, the sense is not complete. *Per Atkins, Hard. 225.*

(E 14.) When a Grant shall be void.

(E 14.) *If it be uncertain.*] A grant shall be void, if it be totally uncertain; as, if a man grant as many trees as can be spared in his manor. *Bridg. 12. Vide ante, (A 3.)*

If he grant 10 *l. per ann.* parcel of his manor, without other certainty. *Bridg. 12.*

(F) A Grantor cannot defeat his own Grant.

**A** Grantor cannot defeat his own grant: and therefore, if a man grant twenty of his best trees to be taken in ten years, the grantor cannot cut down trees without the consent of the grantee. *R. 2 Lev. 142.*

(G) Grant by the King.

(G 1.) What Things he may grant.

**H**OW a grant by the king shall be made, by writ or patent, and under what seal, *vide in Patent, (A—B—C 1, &c.)*

The king, as well as a common person, may make a grant of all lands, and tenements, or other inheritances, which are vested in him at the time of the grant. *2 Rol. 198. l. 15.*

As, he may grant lands, which come to him by descent, or escheat before office found; for the freehold is cast upon him by law. *Vide in Prerogative, (D 66, &c.)*

So, lands, which come in remainder, or reversion, after a particular estate determined.

Or, if the particular estate be determined by a condition broken, tho' the breach does not appear upon record. *2 Rol. 184. l. 10. 15. Vide Prerogative, (D 70.)*

So, if an office be forfeited for being in arrear in an account, or other neglect of a thing required by the patent upon pain of forfeiture,



feiture, where it appears by the record, that the party is in arrear, &c. the king may grant the office to another, without a *scire facias* against the patentee, or office, or other matter of record, which finds the forfeiture. *Dy. 211. 2 Rol. 184. l. 25.*

So, if lands forfeited for treason are vested in the king by the *st. 33 H. 8.* or any particular statute, the king may grant them before office found, notwithstanding the *st. 18 H. 6. 6. 2 Rol. 184. l. 40.*

So, the king may grant a condition, right, possibility, or *chase en action.* *Vide in Assignment (D).*

A ward, &c. *cum acciderit.* *2 Rol. 198. l. 23.*

All wards, marriages, &c. to such a value until such a time. *2 Rol. 298. l. 21.*

So, a power of assenting to an election of a bishop, abbot, &c. *2 Rol. 187. l. 22. 25.*

What jurisdictions, franchises, exemptions, offices, impositions, &c. the king may grant. *Vide in Prerogative, (D 28, &c.)*

### (G 2.) What not.

But the king cannot grant a thing intrusted to him in respect of his sovereignty; as, the lapse of a church, before or after it becomes void. *2 Rol. 187. l. 32. 35. Vide Esglise, (H 11.)*

Nor, purveyance, butlerage, prisage, &c. *2 Rol. 187. l. 35. Vide Prerogative, (D 41, 42. 45.)*

Nor, the power to make a dispensation of a statute. *7 Co. 36. b.*

So, he cannot grant the lands or good of a recusant convict, before the commission returned. *2 Rol. 184. l. 20.*

Nor, the lands or goods of one attainted of treason, before his attainder. *Per fix 7. five cont. Dy. 108. a.*

Tho' the treason was committed at the time of the grant, and the forfeiture has relation to the offence. *24. Dy. 108.*

So, the king cannot grant the prosecution, or execution of any penal statute to another; for it is intrusted with him as the head of the weal-public. *R. 7 Co. 37. a.*

Nor, the penalty or benefit of a penal statute, before it be recovered. *7 Co. 36. b. 37. a.*

Nor, any fine or forfeiture of a particular person, before he be convicted. *Decld by the st. 1 W. & M. 2. that such grant or promise is illegal and void.*

[If the king's grant by letters patent be void, as being contrary to law, yet if the letters patent are confirmed by act of parliament, it makes all good: *Sherlock v. Dean and Chapter of Norwich, H. 5 G. Fort. 222. Str. 159.*]

### (G 3.) When it binds his Successor.

If the king grant lands or tenements, of which he has the fee, the grant binds his successor.

So, if he grant a wine-licence; for he has an inheritance in it, and the interest passes, and not the authority. *R. 1 Sid. 6.*

So, in all cases, where the king grants an interest. *Adm. Hard. 443.*

As, if he grant to an alien, for him and his successors, to be free from alien customs. *Hard. 444.*

To his tenant, that his heir shall not be in ward; for he has an inheritance in the seignior. *Hard. 444.*

Or, that he may alien in *mortmain*. *Ibid.*

So, if the king grant to a college to be discharged of toll, without saying, *for him and his successors*; it shall be discharged in the time of the successor, as well as where an interest passes. *R. Yel. 15.*

But a grant by the king during his will determines by his death. *Mo. 176.*

So, a grant of a mere licence, or authority. *Hard. 443.*

(G 4.) What Grant shall be good.

(G 4.) *In respect of the estate of the king, or the mentioning of it.]* Every grant of the king, of a thing which he may grant, where he is apprised of his interest, and of the cause and circumstances of the grant, will be good.

Tho' every thing is not performed which seemed designed, if the words of the consideration are answered; for no inference shall be made beyond the words; as, if the king grant, in consideration of the surrender of a patent by *A.* and his wife, where the wife cannot surrender; for mention is made only of the surrender of the patent, and not the estate. *R. 1 Co. 42. a.*

Or, in consideration of the surrender of a former patent to be cancelled; if it be delivered into *Chancery*, tho' it be not cancelled. *R. 10 Co. 67. b. 2 Rol. 199. l. 35.*

In consideration, that the lessee for years, being then in possession, surrender, the king grants a new lease, it is sufficient; for the acceptance of the new lease is a surrender, and the king takes notice that he was then possessed. *10 Co. 67. 2 Rol. 199. l. 40.*

Tho' the king does not recite his own estate; for he need not do so. *1 Co. 45. b. 51. a. Mo. 318. 320.*

So, if he recite falsely, that he has an estate in possession by the surrender of a grant in tail, and grants the manor to *B.*, he shall have the reversion, tho' he cannot take the possession. *R. 6 Co. 55. 8 Co. 56. a.*

So, if he recites a grant in tail, and afterwards grants *manerii reversionem, necnon manerium prædictum*, the grant is not void for uncertainty; but if the tail be *in esse* the reversion passes, otherwise the possession. *R. 8 Co. 167.*

So, if the king license his tenant to alien in *mortmain*, he need not mention how he holds. *41 Aff. 19.*

Tho' the king does not mention when the grant shall commence; as, if the king recite a grant of pannage, &c. to *A.* for life, and then grant it to *B.*, without saying, *post mortem*, &c. it will be good; for he shall take when he can by law. *R. 8 Co. 56. a. 2 Brownl. 232. 234.*

So, if the king grant an office, *habendum* from the full age of *B.* which was then passed, it will be good for the future time. *R. 9 Co. 47. b.*

So, if the king grant an advowson to *A.* and the heirs male of his body, who re-grants it to the king in fee, and the king afterwards grants it to *B.* and his heirs; the grant to *B.* will be good, for the king is seised in fee presently, and the recital of his estate is not necessary. *R. Cro. El. 519.*

So,

So, the king's grant will be good, tho' it does not mention what estate the grantee shall have; for he shall take at the will of the king. *R. 8 Jac. ut dicitur per Hale, 1 Vent. 408.*

So, if the king has a conditional estate in fee, and grants in fee, it will be good. *1 Co. 49. b.*

Or, has it *pur autre vie*, and grants *totum statum*, or for 40 years; for the grant was lawful, tho' the grantee cannot have it for 40 years absolutely. *R. 7 Co. 12. a. Mo. 321.*

(G 5.) *In respect of certainty.*] So, a grant of the king, which has sufficient certainty for shewing fully that the king was not deceived, will be good; as, if the king grant the manor of *B.*, without saying, in what county it lies: but the county must be alleged in pleading.

*9 Co. 47. a.*

Tho' he has another manor of the same name; for it shall be distinguished by the tenure, value, occupant, or particular, &c.

*9 Co. 47. a.*

So, if the king grant all his lands, tenements, and hereditaments in *D.*, an advowson, mill, piscary in gross, &c. pass tho' not particularly named: but they shall be severally demanded in a *præcipe*. *2 Rol. 186. l. 5. 193. l. 15. 194. l. 5. 7.*

If the king grant a messuage and all lands *spectantes aut cum eo dimissas*, lands enjoyed with it for a convenient time pass. *R. Cro. Car. 169.*

So, if the king's grant refers to another thing which is certain, it is sufficient; for *id certum est quod certum reddi potest*: as, if he grant to a city, &c. all liberties which *London* has, without saying, what liberties *London* has. *20 H. 7. 7. b.*

Tho' the reference be to a matter *in pais*: as, if the king grant an office, liberties, &c. *adeo plene sicut aliquis alius* enjoyed them; the grantee shall have all advantages which any former patentee enjoyed; as, he may make a deputy, if the former patentee had made one. *R. 9 Co. 30. a. 52. a. R. 10 Co. 64. 2 Rol. 185. l. 45.*

An advowson appendant passes, tho' the *st. Præf. Reg.* says, that it does not pass without express mention; for it shall be satisfied by words *æquipollent*. *43 Ed. 3. 22. b. Dy. 350. b. 2 Rol. 185. l. 30. R. 10 Co. 64. b.*

If he grant a manor *cum tot. tal. franches. libertat., &c. qual. A.* had; the grantee shall have all franchises, &c. which *A.* enjoyed. *Pl. Com. 12. b. 2 Rol. 185. l. 5. 20. Co. L. 121. b. Jon. 349.*

Or, *tot. tal. franches., &c. qual. A.* or any predecessor had; he shall have all that any tenant for life of the manor had, tho' *A.* had them not. *R. 9 Co. 30. a.*

If he grant a manor with all franchises, &c. belonging at the time of his purchase. *2 Rol. 184. l. 54.*

*Cum omnibus exitibus amerciamentis & proficuis residentium infra M. prædictum.* *Pl. Com. 12. b.*

So, if the king, in consideration of 20*l.* paid, grant; it is sufficient without shewing that it was paid: for it is a personal thing executed, and accepted by the king. *R. 10 Co. 67. b. 2 Rol. 200. l. 10.*

Or, in consideration, that the grantee shall repair; if the grantee



does not repair, the grant is not void, for the king may have covenant. 2 *Rol.* 200. l. 5.

So, if the king grant, in consideration of a surrender; it is sufficient, tho' the surrender was not inrolled till after the grant: for the surrender was good, tho' not completed. *Per Hob.* 221.

So, if the king be misinformed, but not deceived, it will be good: as, if he let land, which is recited to be 10 *l. per annum* when it was 20 *l. rendring* 20 *l. per annum*. *Per Poph.* *Rel.* 48.

If he recite land to be concealed, when it was not: where it appears that he intends a grant of the land, tho' not concealed. *Sal.* 561.

If he grant the manor of *B. quod manerium fuit seistum in maner nostras*, &c. tho' it was not so. *R.* 10 *Co.* 113. a.

Or, the office of parker of *B. quod H. habuit*; for it was added for the more certainty. 10 *Co.* 113. a.

Or, the manor of *D. quod fuit in tenura de B.*, when it was not. *Ibid.*

Or, a manor and advowson, *adeo plene* as we by any means had in *cuidam archiepiscopo dudum spectan.*; where the archbishop had the manor, but not the advowson. *R.* 2 *Mo.* 1.

Or, if he grant lands, all which are of such a value; tho' the value be misrecited, if there be a *non obstante* of the misrecital of the value. *R.* *Hard.* 232.

(G 6.) What shall be void.

(G 6.) *If it be uncertain.*] But generally, the king's grant will be void for uncertainty; as, if the king grant such a toll as was taken at *B. aut alibi in Anglia*; it will be void, tho' toll was taken at *B.* 2 *Rol.* 196. l. 30.

Or, all amerciaments before his justices, without saying, what justices, of *B. R. in eyre*, or justices of peace, &c. *Co. Ent.* 384.

Or, a grant to *A.* to be exempt from the office of sheriff, without saying, of what county. *Ibid.*

Or, to have *catalla felon.*, without saying, in what manor, or county. *Ibid.*

To have the custody of all his houses, without saying, what in particular. *R.* *Jon.* 293, 4.

(G 7.) *If too general.*] So, words too general are not sufficient in the king's grant: as, if *bona felon.*, &c. which lie in grant, and not in prescription, are re-united to the crown, or extinguished, and afterwards the king grants the manor *cum tot. tal. libertat. privileg.*, &c. *qual. A. nuper abbas habuit*, who claimed the same privileges by charter; the grantee shall not have *bona felon.* by such general words. *R.* 2 *Rol.* 193. l. 40. *Jon.* 349. *Vide Franchises*, (G 1.)

So, general words in the king's grant never extend to a grant of things, which belong to the king by virtue of his prerogative; for such ought to be expressly mentioned. 2 *Rol.* 195. *E.*

If the king has land by extent for a debt, and grants the land to *A.* that does not pass the debt, without special words. *R.* 3 *Lev.* 135.

If he grant such a waste, that does not pass royal mines there. 1 *Co.* 46. b.

Or, if he grant all mines, gold or silver mines do not pass, not being expressly mentioned. 1 *Co.* 46. b. If

If he grant all the demesnes of the manor of *D.*, copyholds, tho' they are part of the manor, do not pass. *R. 1 Co. 46. b.*

If the king seised of the rectory of *D.* which was appropriated to an abbey, grant the advowson of the church of *D.*, the rectory does not pass, nor the advowson as an advowson in gross; for by the appropriation that was extinguished. *R. 2 Lev. 80.*

(G 8.) *If the king be deceived. By misinformation of his interest.]* So, if the king be deceived in his grant, it will be void. *9 H. 6. 28. b. 1 Co. 44. a.*

As, if the king grant a greater estate than he could lawfully do: as, if the king, seised for life, or for years, grant in fee; it will be void for the whole, for the king was deceived. *1 Co. 44. a. Mo. 321. R. 3 Lev. 135.*

So, if the king, seised in tail, grant in fee.

Or, seised in tail, remainder to himself in fee, grant in tail; for his intent was to make an estate-tail in possession, which he could not. *R. per seven J. two cont. 1 Co. 49, 50. Alt. Woods.*

So, if he grant for life, and afterwards the reversion in fee, it will be void for the whole. *1 Co. 50. b.*

So, a licence to a tenant to alien generally, if he had only an estate-tail, will be void. *21 Aff. 15. 40 Aff. 36.*

So, if the king grant *manerium de R. & M. in com. L.* where they are several manors. *R. 1 Co. 46.*

Or, *manerium de R. cum M.* *1 Co. 46. b.*

If he grant a fair, market, &c. on the same day on which there was an antient fair, &c. *1 Co. 49. a.*

If he grant a rectory *cum decimis*, &c. *prout abbas*; the advowson does not pass, for the king intended a grant of a lay-fee. *2 Rol. 189. l. 15.*

Or, a manor with the franchises, &c. which *A.* had; when the liberties were resumed from *A.* *2 Rol. 185. l. 10.*

Or, lands in *N.* and all courts leet, &c. *præmissis spectan.*; where the leet belongs to the hundred. *R. Mo. 427.*

(G 9.) *By false suggestion.]* So, if the king's grant be founded upon a false suggestion, it will be void; as, if land be recited to be only *10 l. per ann.* when it was *20 l.* *9 H. 6. 28. b. 2 Rol. 188. l. 15. Id. 48.*

Or, that the king had it by escheat, when he had not. *2 Rol. 188. l. 20.*

So, if any thing mentioned as the consideration of the grant, or which sounds for the benefit of the king, (be it executed or executory, matter of record, or *in pais*;) be false; the king is deceived, and the grant will be void. *R. 5 Co. 94. a. 2 Rol. 188. l. 25. 199. l. 30. 50. Lane, 75. 109.*

As, if the king grant, in consideration of the surrender of a prior interest or estate; when the surrender was only in appearance. *Dy. 352.*

Or, the whole was not surrendered. *Dy. 352. R. 5 Co. 94. a. Dub. 2 Rol. 189. l. 35. R. ibidem, l. 25. 45.*

If he grant, in consideration of a grant or surrender by an husband  
X 2 and

and wife; for the wife could not surrender. *R. Hob. 223. 2 Rol. 199. l. 45.*

In consideration of a surrender; when part was leased to another. *2 Rol. 188. l. 25. Per three Bar. Lane, 75. 109.*

In consideration of an antient rent of 5 *l.* 16 *s.* 8 *d.* when the rent was 6 *l.*, but 3 *s.* 4 *d.* allowed for payment at the *Exchequer*; for the rent here is the consideration. *R. Yel. 43. 48.*

In consideration of a surrender, when the surrender was conditional. *2 Rol. 199. l. 52.*

In consideration of the surrender of a lease; and the lease was void. *R. 5 Co. 94. a.*

So, if the king grant a rectory; if it is not in lease, or if it be, after the term, when part was in lease; it will be void: for it was intended that all should pass at the same time. *R. Yel. 43. 48. 2 Cro. 34, 35.*

So, if the recital of a thing in a patent which sounds to the king's benefit be false, the grant will be void, for the king is deceived. *2 Co. 54. 1 Co. 43. a. Dy. 352. a. 11 Co. 90. 2 Rol. 188. l. 12.*

As, if it recite a grant of a reversion which was void, and the grant to commence after it. *R. 11 Co. 4. b. 2 Rol. 188. l. 32.*

If it recite an institution of his presentation; and he then confirms it; where the presentation was repealed. *2 Rol. 188. l. 45.*

If the king lease for 21 years after a former lease to *A.* determines; which was before surrendered. *R. 3 Leo. 5, 6.*

If he grant a manor *ad eo plene* as such an abbot had it; the advowson appendant in the hands of the abbot, which was then in gross in the hands of the king, does not pass. *2 Mod. 2.*

But a recital which is true in terms is sufficient: as, if the king recite that the estate was upon condition; tho' the condition be broken, it does not hurt: for he does not say that the condition continues, and the breach is only matter *in pais*. *R. 2 Co. 54. b.*

So, a false recital of a matter *in pais* executed does not hurt: as, if the king recite, that his estate is fraudulent *prout nobis satis liquet*. *R. 2 Co. 54.*

So, a false recital of a thing, which need not be recited, does not hurt. *Vide ante, (G 4.)*

So, the recital of a consideration which is false does not hurt: as, if the good service by *A.* in war; where none was done. *Semb. Bro. Patent, 1.*

(G 10.) When a Recital is necessary.

If the king grant a reversion upon an estate for life, or years, he ought to make a recital of the particular estate, otherwise it will be void. *R. 1 Co. 44. a. 50. R. 4 Co. 35. b. 8 Co. 56. Sav. 58, 9.*

Or, a reversion expectant upon an estate-tail. *Mo. 206.*

Tho' a subsequent lease recites both the former leases, the lease not reciting the former will be void. *Sav. 58, 9.*

So, if he grant a presentation to *B.* after a presentation of *A.* without mentioning of it; the first shall not be revoked, but the second presentation is void. *Dy. 339. b. 2 Rol. 188. l. 40. R. cont. 190. l. 30. Vide Esq. life, (H 10.)*

So, if the king grant an office for life, and afterwards grant the same office *post mortem*, &c. to another, he ought to recite the first grant, tho' it is not properly a reversion. *R. 2 Rol. 190. l. 20. 8 Co. 57. a.*

So,



So, if the king lease to *A.* and afterwards make a new lease to him, without mentioning the first; it will be void, tho' it operates as a surrender of the former lease. *R. 2 Rol. 190. l. 25.*

But if the king make a lease at will, and afterwards grant the same land to another, he need not mention the lease at will.

Or, a grant, which imports a charge or trust, without fee or profit. *Bro. Patent, 2.*

So, if a reversion, depending upon an estate for life, or years, come the king; in the grant of it he need not mention the lease, because it is not upon record. *Bro. Patent, 93. Per Moir acc.; sed And. cont. Mo. 206. Acc. Dy. 233. a. 6 Co. 56. a. 2 Rol. 199. l. 10. 2 Brownl. 241. Hard. 499.*

So, if the king lease a copyhold, and afterwards grant the same land to another. *2 Rol. 196. l. 50.*

Or, lease part of a manor, and afterwards lease the manor to another, without recital of the former lease. *R. 1 And. 46.*

So, where the recital of a lease is necessary, it is sufficient if he grant the land in lease for life, or years, or the reversion expectant upon such lease, without express mention of the patent, or date. *Bro. Patent, 96. 2 Rol. 190. l. 40. 191. l. 1.*

So, if the date be mistaken. *Bro. Patent, 96. 2 Rol. 190. l. 45.*

So, tho' the patent does not recite the lease, but concludes, *notwithstanding it be in lease for life, or years of record, or otherwise.* *2 Rol. 190. l. 50. R. 4 Co. 35. b.*

So, if there be a grant of a reversion expectant upon a lease for life, or years. *R. 4 Co. 35. b. 2 Rol. 191. l. 5.*

So, if an estate comes to the king, subject to a lease for life, and also for years, and the king reciting the lease for life demises the lands after the death of the life, or when they shall come to the king's hands. *Dub.* For it does not appear, whether the king intended to demise the reversion or the possession. *Hard. 499.*

(G 11.) The King's Grant does not enure to a double Intent.

So, the king's grant cannot enure to a double intent, but he shall be intended to be deceived: as, if he grant *tenere placita coram* his bailiffs, steward, or justice; if there are not such officers before the grant, it does not enure to make such officers, and likewise to give consuance or pleas to them. *2 Rol. 196. l. 42.*

So, if he grant to a spiritual corporation a church *in perpetuum*, it shall not enure to a grant of the church, and likewise to make an appropriation. *2 Rol. 196. l. 45.*

If he grant a copyhold for life, it does not enure to a grant and destruction of the copyhold. *2 Rol. 196. l. 50.*

If he lease for years, a lease afterwards to the same lessee for more years, will be void. *Lane, 22.*

If the king be deceived in his grant, it will be void, tho' made *ex certa scientia*, &c. *R. 1 Co. 49. Alt. Woods,* for that does not help a falsity. *Per Manw'd, Sav. 5. Vide post. (G 12.)*

(G 12.) How the King's Grant shall be expounded.

If the king's grant can enure to two intents, it shall be taken to the intent that makes most for the king's benefit. *21 Ed. 4. 48. b. 2 R. 3. 4. Co. Ent. 384. a. Vide ante, (E 9, &c.)*

And therefore it shall be construed strictly: as, if the king grant a manor purchased by him, with all franchises belonging, &c. the franchises in the hands of the feoffor do not pass; for by the purchase of the king they are re-annexed to the crown. 2 Rol. 184. l. 50. 193. l. 30.

If he grant a manor with all lands, &c. accepted or reputed as parcel; nothing passes which is not parcel in truth and of right. R. 2 Rol. 186. l. 25.

And it must have been parcel time out of mind, &c. 2 Rol. 186. l. 30.

If the king grant all the issues, fines, and amerciaments of his own tenants; the grantee shall not have the amerciaments of him, who holds of the grantee and another. 2 Rol. 193. l. ult.

If he grant a discharge from all customs, it shall not be extended to *magna & nova custuma*, tho' there has been an usage for discharge from them. 2 Rol. 194. l. 10.

If he grant a forfeiture for a trespass, or other offence for which a man shall lose life or member, it does not extend to a forfeiture upon an outlawry, or *premunire*. 2 Rol. 194. l. 35. 42.

If he grant *bona & catalla sua*, it does not pass specialties. 2 Rol. 195. l. 20.

If he grant *bona & catalla felonum de hominibus suis*, it does not extend to goods of his homagers without special usage. 2 Rol. 195. l. 10.

If he grant services, and that the grantee shall be as free as the king in his crown; that does not extend to the discharge of a corody, pension, fine for alienation, &c. 2 Rol. 195. l. 40. 45.

But the king's grant shall have a reasonable construction; as, if the king grant the office of the king's tennis plays; he shall have the office, when those of the household play, as well as the king in person. R. 8 Co. 45. b.

A commission to take singing boys out of the cathedrals for the king's chapel shall be construed of those who get a livelihood there by singing, not of the son of a gentleman who is instructed there. R. 8 Co. 46. a.

If queen Elizabeth had granted a manor with all woods, &c. *moda vel antehac reputat. parcell.*; a wood parcel at the time of Ed. 6. passes, tho' not if it was of a longer time, unless *unquam antehac* was added. R. Dy. 362. a. Co. Ent. 384. a. 2 Rol. 186. l. 15.

If she had granted *totam rectoriam suam* in the singular number, tho' there were originally two rectories, and they were appropriated severally in the time of Ed. 3. it will be good, being reputed as one from the time of Ed. 3. R. 2 Rol. 186. l. 50.

If the king grant the rectory of M. in the county of N. with all lands, tithes, &c. *eadem rectoria spectan.*; tithes, &c. in the county of York belonging to it, pass. Semb. Sav. 55.

So, where the king's grant is capable of two constructions, by the one of which it will be valid, and by the other void, construction shall be made to make it valid; for that will be no more for the benefit of the subject and the honour of the king, which ought to be more regarded than his profit. R. 9 Co. 131. a. 10 Co. 67. b. R. 6 Co. 6.

As, if there be a grant to discharge one from the collection of tithes granted *per clericum Angliae*; he shall be discharged if the grant be *per clericum*

*clerum provincia Cantuariensis*: for it is not usual to have a grant by both provinces together. *R. 21 Ed. 4. 48. b. R. per all the f. 2 R. 3. 4.*

If the king grant all lands, tenements, and hereditaments to a priory *pertin.*, and all piscaries, &c. *specian.* to the said manor; a piscary, &c. in gross passes: for it was not restrained by the last, being within the first words. *R. 2 Rol. 185. l. 50.*

If the king grant a manor and all waifs, estrays, *bona felonum*, &c. *eidem manerio specian.*; *bona felonum*, &c. which cannot be claimed by prescription without charter, pass, tho' never used with the manor. *R. 2 Rol. 192. l. 45. 9 Co. 27. b.*

So, if the king's grant be *ex certâ scientiâ* & *mero motu*, it shall be taken more strongly against the king, and beneficial for the subject: as, if the king pardon a sheriff all contempts, he shall be excused of a false return. *36 H. 6. 24. b. 37 H. 6. 21. b. Co. Ent. 384.*

If he pardon *A. B.* all debts *ex certâ scientiâ*, &c. debts as sheriff are discharged, as well as others. *R. 2 R. 3. 7. a. R. 1 H. 7. 13. a. Agr. 1 Co. 49. a.*

So, a grant *ex certâ scientiâ*, &c. dispenses with uncertainties. *Per Manw. Sav. 5.*

But a grant *ex certâ scientiâ*, &c. shall not be expounded contrary to the proper signification of the words: as, if he grant a portion of tithes in *N.* where he has only tithes parcel of a rectory, it shall not be extended to them: for *portio decimarum* imports tithes in gross. *R. 4 Co. 35. a.*

So, a grant of all the demesnes lands of a manor shall not be extended to copyholds, tho' by law they are parcel of the demesnes. *R. 1 Co. 46. b.*

[G 13.] *When a grant shall be presumed.* [Tho' the crown is not bound by the statute of limitations, yet a grant may be presumed from great length of possession. *Cowp. 215.*]

[Possession for 350 years was held by the court as sufficient ground of presumption, to be left to a jury. *Id. 102.*]

[Tho' the record be not produced, nor any evidence given of its being lost; yet under circumstances, it may be left to the consideration of a jury, or a court of equity, whether there be not sufficient ground to presume a charter. *Id. 110.*]

*Vide more relating to Grant, in Annuity, (A 1, &c.)—Biens, (D 2.)—Chimin, (D 3.)—Common (O.)—Condition, (A 2, 3.—D 4.)—Copyhold, (C 1, &c.)—Courts, (P 1.)—Ireland (D.)—Liberties (B.)—Market, (C 1, &c.)—Officer, (B 1, &c.)—Pardon (A—B—G.)—Prærogative, (D 24.)—Rent, (C 8.)—Toll, (G 2.)*

G R E A T S E A L.

*Vide Patent, (C 2.)*

G R E E N C L O T H.

*Vide Courts (G).*



## GUERNSEY, Isle of

*Vide Navigation, (F 4.)*

## HABEAS CORPUS.

## (A) By what Court granted.

**A**N *habeas corpus* is a writ for bringing the body of him, who is imprisoned, before the court, *cum causâ detentionis*.

And it may be granted, in respect of an unlawful commitment, or in respect of a privilege, which the party claims, to be imprisoned elsewhere.

By the common law, the writ of *habeas corpus cum causâ detentionis* might be granted out of the *Chancery* within the term, or vacation; for the *Chancery* is always open. 2 *Inst.* 53. 4 *Inst.* 81. 290.

And by *B. R.* within term. 2 *Inst.* 53. 4 *Inst.* 81. 290.

And that, in all cases for persons privileged or not privileged. 2 *Inst.* 52, 53. 4 *Inst.* 71. 290.

So, it lies out of *C. B.* or *Exchequer*, for persons there privileged. 2 *Inst.* 53. *marg.* 4 *Inst.* 290. 2 *H. Hist. P. C.* 144.

So, tho' they are not privileged there. *Vau.* 154, 155, 156. 2 *Jon.* 13. 17. *R. cont. per three J.* 2 *Mod.* 198. *Semb.* 2 *Mod.* 306. *Cont. per North,* 1 *Mod.* 235. It shall not be granted. 2 *Vent.* 24. *R. acc. per three J. Vaughan cont. Cart.* 222.

But tho' an *habeas corpus* may be granted by *C. B.* yet it is not the proper court for it; because it cannot discharge, or intermeddle as *B. R.* may, if it is a criminal matter. *Per Vaughan, Cart.* 222.

[*C. B.* has a general jurisdiction to grant it in all cases whatsoever. *Wood's case, H.* 11 *G.* 3. 3 *Wils.* 172. 2 *Bl. Rep.* 745.]

By the *st.* 31 *Car.* 2. 2. an *habeas corpus* may be obtained in term out of the court of *Chancery*, or *Exchequer*, as well as *B. R.* or *C. B.*, by any prisoner.

And in vacation on complaint, &c. the chancellor or keeper, any justice of the one bench, or the other, or baron of the coif, shall on view of the copy of the commitment, or oath of denial of the copy of it, and request of the party, or some other in his behalf, in writing subscribed by two witnesses present at the delivery, award an *habeas corpus* to the officer, in whose custody the party is, returnable immediately before himself, or some other justice, or baron, under the seal of the court whereof he is a judge, &c. on pain of 500*l.* to the party grieved.

And it may be directed and run to any county palatine, *cinque-port*, or other privileged place in *England*, *Jersey*, or *Guernsey*. *Latch*, 160.

So, to *Ireland*. *Semb.* 1 *Vent.* 357.

So, it lies, tho' a *certiorari* be taken away in such case by statute. *Per Hale*, 1 *Mod.* 102.

[*Habeas corpus ad testificandum*, lies to remove a prisoner in execution, to be a witness; yet, where it appears to be a contrivance, the court will not grant it; as, if *A.* convicted of bribery on the oath  
of

of *B.* indicts him for perjury in that very oath, they will not grant it. *Rex v. Burbage*, T. 3 G. 3. 3 B. M. 1440.]

[So, a *habeas corpus* lies to bring up a prisoner to give evidence. But a *habeas corpus ad testificandum* ought not to be granted to bring up a sailor on board a ship, who is not detained there as a prisoner, without an *affidavit* that he has been served with a *subpœna*, and is willing to attend. *Corp.* 672.]

[Neither will it lie, to bring up a prisoner of war. *Doug.* 419.]

(B) For what Cause. *Habeas Corpus ad Subjiciendum et Recipiendum.*

A *habeas corpus* ought to be granted of right. R. 2 *Inst.* 615. R. in *Parl.* 1 *Russ.* 513. *Vide post.* (G 1, 2.—H 1, 2.)

And therefore, if a man be imprisoned for any cause, except upon a conviction for a crime, or in execution, he may have an *habeas corpus cum causâ detentionis*, &c. 2 *Inst.* 52. 2 *H. Hist.* 143.

So, by the *st.* 31 *Car.* 2. 2. a person committed or detained for any crime, unless for treason or felony plainly expressed in the warrant, (other than persons convict, or in execution by legal process,) may in vacation complain or appeal to the chancellor, justice, or baron, &c. who shall award an *habeas corpus*, &c.

And by this statute *C. B.* has jurisdiction to bail, discharge, or remand. 2 *H. Hist.* 144.

And if the crime appears, *C. B.* may bail *quoad* the action, and remand *quoad* the crime. *Ibid.*

If he be committed by warrant of the chief justice of *B. R.* he ought to be brought to the court by *habeas corpus*, not by rule. 1 *Sal.* 349.

So, if a person be lawfully imprisoned, and afterwards unlawfully detained, he may have an *habeas corpus* for his discharge: as, if a forester take a man with the manner within a forest, or a man may be indicted for killing or hunting a deer in the forest, as he may, who afterwards offers sufficient pledges which are refused; the offender shall have an *habeas corpus*, whereupon he shall be bailed for his appearance at the next eyre. 4 *Inst.* 290.

[It will be granted for detaining a child under age from her father. 1 *Bl. Rep.* 386.]

[A man impressed under a press-act, who is not in custody, (either as having absconded, or as being promoted to be a corporal,) cannot bring *habeas corpus*; but the court will, on motion, grant a rule to the commissioners for putting the act in execution, to shew cause why he should not be discharged. *Rex v. Dawes*, *Rex v. Kessel*, T. 31 G. 2. 1 B. M. 636, 637.]

[The *stat.* 6 & 7 *Will.* 3. c. 18. s. 19. which allows to the master of every ship, engaged in the coal trade, two seamen free from impressing, is still in force; and if the master nominate those seamen before the ship sails, and they be afterwards impressed, the court of *B. R.* will grant an *habeas corpus* to the officer impressing them, to bring them up that they might be discharged. *Ex parte Dryden*, M. 34 Geo. 3. 5 T. R. 417. *Ex parte Gallile*, T. 38 Geo. 3. 7 T. R. 673. *contra.*]

[A sea-faring man, serving the office of headborough, is not thereby exempted from being impressed. *Ex parte Fox*, E. 33 Geo. 3. 5 T. R. 276.]

[If the person confined is too weak to be brought into court, they will make a rule that certain persons shall have access to him. *Rex v. Wright*, M. 1 G. 3. 2 B. M. 1099. *Rex v. Turlington*, H. 1 G. 3. 2 B. M. 1115.]

[But will not give that liberty unless to persons who have some pretension to demand it. *Rex v. Clarke*, M. 3 Geo. 3. 3 B. M. 1362.]

### (C) When it shall not be allowed.

**B**UT by the *ft.* 2 H. 5. 2. none shall be discharged, or bailed upon an *habeas corpus cum causa*, &c. if it be returned, that he is in prison on condemnation by judgment against him, but he shall be remanded and kept in safe custody till agreement of the party, or payment of the sum adjudged.

So, by the *ft.* 31 Car. 2. 2. a person committed for treason or felony, plainly expressed in the warrant of commitment, or convict, or in execution by legal process, is not entitled to an *habeas corpus* in vacation by force of that act.

[To a person committed for high-treason by rule of court. *Rex v. Leonard*, H. 5 Geo. Str. 142.]

[A person committed for high-treason done in Scotland, is not within the act. *Rex v. Mackintosh*, P. 6 Geo. Str. 308.]

Nor, a person wilfully neglecting to pray an *habeas corpus* by the space of two whole terms after his imprisonment.

So, a peer, impeached by the House of Commons for high treason, is not *de jure* bailable in B. R. nor shall be bailed in discretion, tho' he has continued two years in custody; not being within the *ft.* 31 Car. 2. R. Ray. 381.

So, a person, committed by the House of Peers, or of Commons, being a member of the same house, shall not be discharged upon an *habeas corpus*. R. 1 Mod. 157, 158. *Ld. Shaftsbury*.

Nor, bailed during the session of parliament. R. 1 Mod. 157, 158. *Per Sir W. Jones*, in Parl. 30 December, 1680. [2 Bl. Rep. 754. 3 Wils. 188.]

Tho' the commitment be only for a misdemeanor. 1 Mod. 158.

So, a person committed by the House of Commons for a breach of privilege. *Per three J. Holt*, cont. Sal. 503.

So, if it be used for avoiding a lawful suit, upon shewing of this at the return, the court will grant a *procedendo*. 1 Sal. 8.

[No *habeas corpus* lies for an alien enemy, a prisoner of war, however ill used or deceived. 2 Bl. Rep. 1324.]

[Nor, for a prisoner of war, the subject of a neutral power, taken in the enemy's service, into which he was forced when taken prisoner by them in an *English* ship. *Rex v. Schiever*, P. 32 Geo. 2. 2 B. M. 765.]

### (D) How it shall be awarded.

**B**Y the *ft.* 1 & 2 Ph. & M. 13. no *habeas corpus*, &c. shall be granted to remove a prisoner, unless signed by the chief justice,  
or



or in his absence by some other justice of the court, on pain that the writer forfeit 5 *l*.

By the *st. 31 Car. 2. 2.* an *habeas corpus* granted pursuant to that act, shall be indorsed, *per st. 31 Car. 2. regis*, and signed by the judge that awards it. And a writ of *habeas corpus* if not signed by a judge, needs not be obeyed. *Cowp. 672.*

If an *habeas corpus* be awarded for any one in prison for a crime, it shall not be without motion. *1 Lev. 1. 2 Mod. 306.*

Otherwise, where it is for another person. *1 Lev. 1.*

So, an *habeas corpus* must be directed to the officer in whose custody the prisoner remains. *St. 31 Car. 2. 2.*

And therefore, if it be to the sheriff or gaoler, it is bad. *R. 1 Sal. 350.*

### (E 1.) How returned.

BY the *st. 31 Car. 2. 2.* if an *habeas corpus* be served upon an officer who hath the custody, or left at the gaol with the under-keeper, &c. he shall in three days after delivery, (if within twenty miles, or in ten days if above twenty and under a hundred miles, or in twenty days, if above a hundred miles,) return the writ, and bring the body, and certify the true cause of detainer, or imprisonment, according to the command of the writ, on payment of 12 *d.* per mile, and the party's own bond to pay the charge of the return if remanded, and not to make escape by the way.

If the officer refuse to make a return, or bring the body, &c. or to give a copy of the warrant of commitment in six hours after demand, he shall for the first offence forfeit 100 *l.*, and for the second offence 200 *l.* and be incapable of office.

And a recovery or judgment by any party grieved shall be a sufficient conviction for the first offence, and any after recovery by a party grieved for any offence after the first judgment shall be a sufficient conviction to bring the party under the penalty for the second offence.

[On a *habeas corpus* granted by a judge in the vacation, returnable immediately before himself at his chambers, the party may be brought into court in term. *Rex v. Dr. Shebbeare, H. 31 G. 2. 1 B. M. 460. Rex v. Mead, P. 31 G. 2. 1 B. M. 542.*]

[Or, if on a *habeas corpus* so returnable the party is brought before him, he may, if he judges it advisable, adjourn the return, and direct him to be brought into court the first day of term. *Rex v. Clarke, T. 31 G. 2. 1 B. M. 606.*]

[A constable is an officer within the meaning of *stat. 31 Car. 2. c. 2.* and obliged to give copy of warrant of commitment. *Hudson v. Ash, P. 5 G. Str. 167.*]

The officer must shew by his return, by whom the party was committed, and the cause of the commitment. *2 Inst. 55.*

[And the return must answer to the taking, as well as to the detention. *2 Bl. Rep. 1204.*]

And if he does not make a return after delivery of the writ, an attachment lies against him. *2 Jon. 178.*

Tho' his charges are refused; for the court taxes and compels the payment of the charges, if the officer and prisoner do not agree, or he does not pay according to the agreement. *R. 2 Jon. 178.*

By

By the common law if an *habeas corpus* be not returned, an *alias* and *pluries* lie, and afterwards an attachment. 2 *Lev.* 129.

[The court will require a return to be made to the first writ of *habeas corpus*, without issuing an *alias* or a *pluries*; and if the first writ be not obeyed, an attachment will immediately issue. *Rex v. Winton*, M. 33 Geo. 3. 5 T. R. 89.]

[If a *habeas corpus* is not returned, attachment *nisi* shall go, without rule to return. *Rex v. Wright*, M. 5 G. 2. Str. 915.]

[The court will not grant an attachment to accompany a *habeas corpus*. *Rex v. E. Ferrers*, T. 31 G. 2. 1 B. M. 631.]

[If *habeas corpus* is not obeyed, the court will grant attachment, even against a peer; for he has no privilege against the process of *Westminster-Hall* to compel obedience to *habeas corpus*. *Ibid.*]

And the return ought to be made within three months. 1 *Sid.* 78.

[On good cause shewn, as that the person confined is a lunatic, confined by her nearest relations, who are proceeding to get a commission of lunacy, the court will enlarge the time to return. *Rex v. Clarke*, M. 3 G. 3. 3 B. M. 1362.]

But where the commitment is for treason or felony plainly expressed in the warrant, the officer is not obliged by the *st.* 31 Car. 2. 2. to make a return, as directed by that statute.

[The court will not receive the return, till the return-day. 2 *Bl. Rep.* 805.]

#### (E 2.) What shall be a good Return.

The return to an *habeas corpus* ought to shew the cause of commitment specially and certainly. 2 *Inst.* 55. R. Cro. Car. 507. R. *Vau.* 137. Pal. 558. Vide in *Mandamus*, (D 3, &c.)

And therefore, if the return be, *that he was committed for a contempt in not performing an order between A. and B. made upon 3d day of M.*, it will be good. R. *Mo.* 840.

Or, *for not performing an order in the Star-Chamber for such and such words.* R. Cro. Car. 168.

Or, *not performing an order of the Exchequer for payment of a fine; without saying, for what cause imposed; for it is a court of justice.* R. Cro. Car. 579.

Or, *for suspicion of treason, without saying what species of treason.* *Semb.* Pal. 558.

So, if the return shews a good cause of commitment, it will be good, altho' it wants form: as, if the return says, *that it was awarded in court, quod remaneat in custody for a fine, without saying, quod committitur pro fine.* R. 5 *Mod.* 24. 1 *Sal.* 348.

If it shews a judgment by the court of Admiralty, &c. tho' the proceeding be irregular. R. 2 *Rol.* 157.

[That defendant was committed for back-bearing and carrying away a deer, is good after conviction, tho' it does not say *unlawfully*; but not before conviction. *Rex v. Hawkins*, P. 2 G. Fort. 272.]

[That before delivery of the writ he had delivered the woman to her husband, and knows not where she is. *Rex v. Wright*, M. 5 G. 2. Str. 915.]

[A return to an *habeas corpus* to bring up the body of *Mary Wilkes*, wife of *John Wilkes* esq., stating that the husband had executed articles of separation, and covenanted never to disturb her or any person with

with whom she should live, was holden a good return; the court considering this agreement to be a formal renunciation by the husband, of his marital right to seize her, or force her back to live with him. *Rex v. Mead*, E. 31 G. 2. 1 Burr. 542. *Semb.* 5 T. R. 91.]

["That, at the coming of the writ, defendant was not in the keeper of the prison's custody." *Rex v. Bethuen*, M. 12 G. 2. Andr. 281.]

["That, before the coming of the writ, defendant was discharged out of his custody by an order of sessions," without saying what sessions, what order, or that he was discharged by due course of law; good for the purpose of filing the writ. *Ibid.*]

[To a *habeas corpus* directed to the king's messengers, to bring in the body of A. B. it seems a good return, that at the time of the coming of the writ, or at any time since, he was not in their custody. *Semb.* 2 Wils. 154.]

(E 3.) What not.

But a return is insufficient, if it does not shew an express and certain cause of commitment. 2 Inst. 55. R. Vau. 137.

[Where a man is committed for any crime, either at common law or by act of parliament, for which he is punishable by indictment, a return that he was committed *till discharged by due course of law*, is good. But if the commitment be in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority; and therefore, if it do not appear on the return, to have been according to that authority, the return will be bad. 2 Bl. Rep. 806, 7.]

As, if a return be, *that the commitment was for a contempt of the court of Chancery*, without shewing wherein the contempt was. Mo. 839, 840.

Or, *for giving a verdict contrary to law, to the oath, or the evidence*, without saying what the evidence was. R. Vau. 137. 2 Jon. 15.

Or, *for a contempt of a command*. Mo. 839.

Or, *a contempt contrary to an order or decree of the court*. Mo. 839.

Or, *contrary to an order between A. and B.* Mo. 839.

Or, *for refusal of an answer to articles before the high commissioners*, without saying, what articles; for perhaps they were not within their jurisdiction. R. Mo. 840.

Or, *for ill behaviour or words to the Privy-Council*, without saying what words. R. Cro. Car. 133.

Or, *by a precept of the Secretary of State, &c.* R. 2 Leo. 175.

Or, *of the Privy Council*. 4 Leo. 21. cont. R. acc. 3 Leo. 194.

Or, *by command of the commissioners in causes ecclesiastical*. R. 4 Leo. 21.

So, a return, *that he was committed for aiding the escape of one in custody for high treason*, without saying, what species of treason, is bad. *Semb.* 5 Mod. 83. 85. 1 Sal. 347.

*That he was committed for refusing sureties for his good behaviour*, without saying in what sum. R. 2 Vent. 23.

[That the African Company had retained the defendant in their service, and sent him to the Savoy till he should embark, is bad, and defendant was discharged, and an information ordered against him the colonel and the keeper of the Savoy. *Rex v. Drew*, M. 7 G. Str. 404.]

Or,



Or, for refusal to account for toll, and till he do account, without saying, for what sum. *R. F. g. 266.*

[That defendant was committed by two justices of peace, for that he, being overseer of the poor, had not accounted as by statute directed, and had not accounted before them, bad; he might have accounted before others. *Rex v. Gibson, P. 1 G. Fort. 272.*]

So, if a return be, that he was committed upon complaint for such an offence, and there being cause upon examination to suspect him, without an express charge of any offence. *R. 2 Vent. 23.*

If a return be, that upon a plaint in an action upon the case in such a court *exitus est junctus & pendet indiscussus*, it is bad; for it ought to return the whole declaration, whereby the cause of action may appear to the court. *R. Carth. 75.*

And if the plaintiff has not declared at the delivery of the writ, he ought to declare immediately; that it may be returned. *Carth. 75.*

So, if the commitment was by warrant, the return ought to shew the warrant itself. *Semb. 5 Mod. 159. 162. R. 1 Sal. 349.*

If it was by the court to a proper officer present without warrant, he ought to return the whole truth of the fact. *R. 1 Sal. 349.*

If he was committed by a warrant upon a writ *de excommunicato capiendo*, the writ ought to be returned as well as the warrant. *R. 1 Sal. 350.*

If a return be upon an *habeas corpus alias*, or *pluries*, it ought to say that he was not, &c. at the time of the first writ. *2 Lev. 129.*

[The following return to an *habeas corpus*, "I had not at the time of receiving this writ, nor have I since had the body of *A. B.* detained in my custody, so that I could not have her before," &c. was holden insufficient, because it was evasive. *Rex v. Wenton, M. 33 Geo. 3. 5 T. R. 89.*]

Yet the default of an averment of a fact in a return may be amended in court. *Per Hale, 1 Mod. 103.*

So, the omission of the words, in which the contempt consists. *Cro. Car. 133.*

If a return be insufficient, the officer shall be amerced. *1 Sal. 350. Vide in Return, (F 3.)*

And an *alias habeas corpus* goes, and afterwards, if no return, or a bad one, an attachment. *1 Sal. 350.*

#### (F) When the Party shall be discharged, or remanded.

**A**T the return of an *habeas corpus* the court, generally, ought to discharge, or remand the party. *2 Inst. 55. 2 H. Hist. 143.*

And therefore, if the return shews no cause, or no sufficient cause, for the imprisonment and detainer, he shall be discharged. *2 Inst. 55. 615. R. Vau. 156.*

And that always in *C. B.* and in the *Exchequer*. *Vau. 157.*

But, if the return shews a sufficient cause, he shall be remanded. *2 Inst. 55.*

So, if the cause shewn appears sufficient, tho' it be false. *R. 9 H. 6. 44. a.*

So, if the cause be sufficient, but the return be defective in form. *R. 1 Sal. 348.*

Yet *B. R.* may bail if they please, tho' the return be sufficient.

<sup>2</sup> *Inst.* 55. *Vau.* 157. <sup>1</sup> *Sid.* 78.

Or, before it be determined, whether the return be sufficient, or not.

<sup>5</sup> *Mod.* 23.

So, pending the debate whether it be sufficient, *B. R.* may remand to the same prison, or to the Marshalsea. *R.* <sup>1</sup> *Vent.* 330. 346.

And by the *st.* 31 *Car.* 2. 2. the chancellor, judge, or baron in two days after the party brought before him on an *habeas corpus* in vacation pursuant to that statute, shall discharge the prisoner, on a recognizance with one or more sureties to appear in *B. R.* next term, or at the next assizes, &c. where he shall certify the said writ, return, and recognizance, unless he was committed by legal process, &c. from a court that hath jurisdiction, or a warrant of a judge or justice for an offence for which he is not bailable.

Or, if committed as accessory before to petit treason or felony, or on suspicion of it, where the petit treason or felony is specially expressed in the warrant, he shall not be bailable otherwise than as before that act.

[A person committed by Secretary of State, to the custody of a messenger, on suspicion of high-treason, and kept there two years, shall be discharged without bail, unless attorney-general undertakes to prosecute directly. *Rex v. Fitzgerald*, *M.* 23 *Geo.* 2. <sup>1</sup> *Wils.* 254.]

[*B. R.* cannot remand a prisoner to the custody of a king's messenger, but must commit him to the marshal of *B. R.* *Rex v. Shebbear*, *H.* 31 *G.* 2. <sup>1</sup> *B. M.* 460.]

[Where there is a conviction the court will not discharge on the warrant of commitment, without having the conviction before them. *Rex v. Elwell*, *H.* 1 *G.* 2. *Str.* 794.]

[On *habeas corpus* returnable before chief justice, commitment by another judge is good without amendment of return. *Barnes*, 20.]

[A child of nine, delivered to her uncle, her testamentary guardian. *Rex v. Johnson*, *H.* 10 *G.* *Str.* 579.]

[*N. B.* She was taken from the guardian appointed by the spiritual court, and who was her near relation, was to have no benefit by keeping her, had taken great care of her, and with whom she was willing to go. <sup>2</sup> *Ld. Raym.* 1354.]

[If a boy of 13 is brought up by *habeas corpus* sued by his father, to have him delivered to him by his aunt, the court will deliver him from the aunt, and let him go where he pleases, for they will not determine the right of guardianship in a summary manner, and the father has other remedies to bring it in question. *Rex v. Smith*, *T.* 7 *G.* 2. *Str.* 982.]

[A young lady of full age decoyed from her father to be married to a mean person, brought back by the father's means to his house, and *habeas corpus* brought by one of the decoyers, the court will ask, whether she desires to continue with her father, or to go elsewhere? if she answers to continue with her father, they will only say she is at liberty to go. *Rex v. Clarke*, *T.* 31 *G.* 2. <sup>1</sup> *B. M.* 606.]

[If the putative father of a bastard obtain the possession of her from her mother by fraud, the court will order her to be restored to the mother. *Rex v. Soper*, *E.* 33 *Geo.* 3. <sup>5</sup> *T. R.* 278.]

[If an apprentice of the age of eighteen, voluntarily enter into the

the sea-service, his master is not entitled to sue out an *habeas corpus* to bring him up. *Rex v. Reynolds, M. 36 Geo. 3. 6 T. R. 497.*]

[If an apprentice be impressed into the sea-service, the master cannot sue out a *habeas corpus* to bring him up to be discharged, tho' the apprentice may. *Rex v. Edwards, B. R. T. 38 Geo. 3. 7 T. R. 745.*]

[In such cases the Lord Chief Justice under a statute of Henry 8. possesses the power of granting warrants to bring up apprentices in that situation, and frequently exercises the power. *Ibid.*]

[The House of Lords having voted the defendant guilty of a breach of privilege in publishing a libel upon a member of their house, and having sentenced him to pay a fine of 100*l.*, and to be imprisoned six months, and until such fine was paid, which commitment was returned into *B. R.* upon a *habeas corpus* sued out by the defendant, the court refused to discharge him out of custody. *Rex v. Flower, T. 39 Geo. 3. 8 T. R. 314.*]

[On the appearance of the party, the court will only see that he is under no illegal restraint; but in the case of a young lady, the court will order the tipstaff to wait upon her home to her guardians. *Rex v. Clarkson, T. 7 G. Str. 444.*]

[A wife ill used by her husband and flown from him to mother, brought up by *habeas corpus*, on the husband's application, swears the peace against him; she shall not be delivered to him, but the court will grant her tipstaff to secure her from insult in her return to her friends. *Anne Gregory's case, M. 7 G. 3. 4 B. M. 1991.*]

[On a *habeas corpus* sued out by the father of a kept mistress, aged eighteen, directed to her keeper, the court declared she might go where she pleased, and that none should meddle with her *redeundo*; but would not in this case send a tipstaff to protect her. *Rex v. Delaval, T. 3 G. 3. 3 B. M. 1434.*] 1 *Bl. Rep.* 410.

[If a sane person confined in a mad-house by her husband, is brought up, and intends to demand the peace, but has not articles ready stamp'd, the court will permit her to go with a friend, he undertaking to produce her. *Rex v. Turlington, H. 1 G. 3. 2 B. M. 1115.*]

### (G 1.) Habeas Corpus ad Faciendum, et Recipiendum.

SO, an *habeas corpus* lies for a person, committed within an inferior jurisdiction, upon a pretence of privilege, to be sued in a superior court. *Vide ante (B).—post. (H 1, 2.)*

The form of the writ is, *ad faciendum & recipiendum, &c.* 1 *Mod.* 235. *Off. Br.* 110. 112. *Th. Br.* 131.

And such writ goes to every inferior court.

To the *Cinque-Ports.* 1 *Mod.* 20.

To the governor of *Jersey*, or *Guernsey.* 1 *Sid.* 386.

[An information *qui tam* on *st.* 8 *Geo. 1. c. 7.* for a fraud in weighing and packing butter, exhibited, by virtue of that statute, in the sheriff's court at *York*, may be removed into *B. R.* by *habeas corpus cum causâ.* *Corwp.* 523.]

If an *habeas corpus* be delivered to an inferior court and the judge there proceeds afterwards; the proceeding will be erroneous and *coram non iudice*, and shall be reversed for this cause. *R. 2 Jon.* 209. *Or,* *R. 1 Sal.* 352.



Or, a *superseas* shall go. *Cro. Car.* 79.

So, the judge may be punished by attachment for his contempt.

3 *Mod.* 85.

Tho' the return be at a day after the end of the term. *R.* 1 *Mod.* 195.

After an *habeas corpus*, which removes the cause to *B. R.*, &c. the plaintiff must commence *de novo*. *R.* 1 *Sal.* 352.

[*C. B.* cannot commit to the *Fleet* a prisoner on a justice's warrant, for want of sureties on indictment for bastard; nor on *excommunicato capiendó* out of *Chancery*, returnable in *B. R.*, nor for an extent out of the *Exchequer*. *Barnes*, 223.]

[But they may on *Exchequer* process on recognizance forfeited at sessions. *Ibid.*]

[If prisoner is removed by *habeas corpus* before declaration delivered, plaintiff must declare in the court whether he is removed, if, after declaration delivered, he proceeds where he declares. *Barnes*, 384.]

[*Habeas corpus* shall be allowed, tho' not delivered till after interlocutory judgment signed below, and notice of writ of inquiry given. *Cox v. Hart*, *H.* 32 *G.* 2. 2 *B. M.* 758.]

[It is the practice to allow it, if delivered at any time before the jury sworn, notwithstanding 21 *J.* 1. c. 23. *Ibid.*]

(*G* 2.) When it shall not be allowed.

But by the *st.* 43 *El.* 5. an *habeas corpus*, &c. shall not be allowed to remove a cause in an inferior court, after any of the jury sworn; but the steward, &c. may proceed.

So, by the *st.* 21 *Jac.* 23. no *habeas corpus*, *certiorari*, &c. shall be received or allowed, to remove any action, &c. depending in any inferior court of record, which hath jurisdiction, the cause of action arising within the jurisdiction, unless delivered before issue or demurrer joined, so as it be not joined within six weeks after the arrest or appearance of the defendant; but the steward, judge, &c. may proceed as if no writ delivered.

Nor, to stay or remove any action, &c. not concerning the title of land, lease, or rent, if it appears by the declaration, that the debt, damages, or demand exceed not 5 *l.*

Or, any action before remanded by *procedendo*.

So, by the *st.* 12 *Geo.* 29. a judge described in the *st.* 21 *Jac.* 23. may proceed, &c. where the cause of action appears, or is laid not to exceed 5 *l.*, tho' there be other actions of higher value against the same defendant.

Yet if the cause of action does not arise within the jurisdiction of the court, an *habeas corpus* ought to be allowed. *R.* *Cro. Car.* 79.

So, by the *st.* 21 *Jac.* 23. that act does not extend to an action wherein a foreign or other plea is pleaded, which cannot be tried or determined within the jurisdiction.

Or, if no utter-barrister of three years' standing at the bar be steward, town-clerk, judge, or recorder, or assistant to the judge of such court, and there present, and not counsel in any cause there.

[An utter-barrister of three years' standing, must at all events be present in every inferior court at the trial, either as judge or assistant,

ant, or the trial is void, and *habeas corpus* lies. *Fairley v. McConnel*, *H. 31 G. 2. 1 Bl. M. 514.*]

And therefore, if an *habeas corpus* be delivered after issue, if the judge proceed, not being an utter-barrister, an attachment shall go. *R. 3 Mod. 85. Cro. Car. 79.*

If the steward, &c. be an utter-barrister, if he be present only by a deputy, who is not an utter-barrister. *Cro. Car. 79.*

So, if an utter-barrister be steward, he shall be in contempt if he does not return the writ with the special matter. *R. Carth. 69.*

So, upon an *habeas corpus* to remove a cause out of an inferior court, a *procedendo* shall be awarded, if it appears that the action is maintainable there only. *R. Carth. 75.*

[On a return of a bye-law, the court will not enter into the validity of it, in order to grant *procedendo*; but plaintiff must declare here, and defendant may demur if he has objections. *Ballard v. Bennet*; *Ballard v. Clement*, *P. 32 G. 2. 2 B. M. 775.*]

So, if an *habeas corpus* be after an interlocutory judgment, and before final judgment, and before the return the defendant dies; for otherwise the plaintiff cannot have a *scire facias*, which is given against the executor by the *st. 8 & 9 W. 3. 11.* and must be out of the court where judgment is given. *R. 1 Sal. 352.*

[After interlocutory judgment, it is too late, and *procedendo* shall be awarded. *Barnes*, 221.]

[So, after issue joined. *Ibid.*]

A *procedendo* may be awarded after the return of an *habeas corpus* filed; for the record itself is not thereby removed, but the inferior court suspended only. *R. 1 Sal. 352.*

[In action against two partners, if one brings *habeas corpus*, and puts in bail for himself only, plaintiff shall have *procedendo*. *Fry v. Carey*, *T. 8 G. 1. Str. 527.*]

### (H 1.) Habeas Corpus ad Respondendum.

SO, an *habeas corpus* lies to bring up a man in prison to the bar, and to be charged at the suit of another. *1 Mod. 235. Off. Br. 110. Thef. Br. 131. Vide ante; (B—G 1, 2.)*

Or, for an husband and wife, that he alone may be charged, and the wife dismissed. *1 Lev. 1.*

So, it lies, where a man has privilege in *C. B.* and is there sued; and if upon the return it appears, that he is committed without cause, or by a court not having jurisdiction, he shall have his privilege. *2 H. Hist. 144.*

If it be doubtful, he shall be bailed to appear in *B. R.* *Ibid.*

[If it is teste'd in term, it may be returnable *immediate* before the chief justice. *Bettesworth v. Bell*, *P. 6 G. 3. 3 B. M. 1875.*]

[Plaintiff may remove defendant by this writ, after he has declared against him in custody of the sheriff. *Ibid.*]

[Defendant may be committed, tho' return-day is past. *Barnes*, 221.]

[If defendant is in custody at the suit of the crown, he cannot be turned over on *habeas corpus* to another prison, at the instance of a private person for debt; if he alleges a pardon by act of parliament,

ment, it must be by suggestion on the record, that the crown may traverse. *Rex v. Pawlett*, T. 11 & 12 G. 2. *Andr.* 274.]

[A prisoner in the *Fleet* for contempt in *Exchequer*, in not paying a debt to the crown, may be brought into *B. R.* by *habeas corpus*, and surrendered to the marshal in discharge of bail in another cause, and he cannot be remanded to the *Fleet* on motion; but a *habeas corpus* must be brought from *Exchequer*: the marshal will return it there, and they may remand him to the *Fleet*.

So, in civil causes between subjects, and in criminal causes at suit of the crown. *Chitty's case*, T. 22 & 23 G. 2. 1 *Wilf.* 248.]

[If defendant is to be charged in execution on several judgments, there must be a *habeas corpus* on every judgment. *Barnes*, 223.]

[Prisoner in the *Fleet* by process of *C. B.* may be brought up by rule, but if held by execution of another court there must be *habeas corpus*. *Barnes*, 385.]

[If a prisoner, who is brought up from a county gaol, to be turned over to the King's Bench, will not pay the sheriff the charges of bringing him up, the court will remand him. *Anon.* P. 6 G. 1. *Str.* 308.]

[If 1 s. per mile is tendred and refused, attachment shall be granted. *Barnes*, 377.]

[But the gaoler must obey the *habeas corpus*, tho' the prisoner refuses to pay his fees, for he has his remedy for them. *Hopman v. Barber*, M. 2 G. 2. *Str.* 814.]

[If plaintiff deliver sheriff *habeas corpus* to remove defendant in execution on a *ca. sa.* to *B. R.* prison, he cannot refuse to obey till his poundage is paid. *Semb. sed qu.* For it was argued in this case, that he should carry him to a judge's chambers; and *Foster J.* said, if he came before him, he would not turn him over till poundage paid. *White v. Haugh*, M. 20 G. 2. *Str.* 1262.]

#### (H 2.) To what Court.

An *habeas corpus ad respondendum* does not lie to a county palatine. 1 *Sal.* 354.

A man brought by an *habeas corpus ad respondendum* to *B. R.* shall not by another *habeas corpus* be removed to the *Fleet* till he has answered in *B. R.* 1 *Sal.* 350.

So, a man in execution upon a sentence in the Admiralty shall not be removed by an *habeas corpus ad respondendum*, and committed to the marshal of *B. R.* before an action there depending. *R.* 1 *Sal.* 351.

[If defendant is brought up by *habeas corpus* from the Admiralty, there charged with embezzling goods of the ship; on affidavit, that he is indebted to the plaintiff on promissory note, he shall be turned over to the marshal of *B. R.* *Rutherford v. Scott*, T. 5 & 6 Geo. 2. *Str.* 936.]

Or, if taken up for a misdemeanor, and then charged with an extent at the suit of the king, he shall not be brought up by *habeas corpus* to be declared against in *B. R.* *R.* 1 *Sal.* 354.



(I) How an *Habeas Corpus* shall be made returnable.

**A**N *habeas corpus cum causa* directed to the sheriffs of *London* and *Middlesex* may be made returnable *immediatè* before the court of *Exchequer*, or a baron in vacation. *Per Rule.*

So, an *habeas corpus* for surrendering a man in discharge of his bail.

But, generally, an *habeas corpus* shall be returnable at a day certain.

And therefore, an *habeas corpus ad respondendum*, or *satisfaciendum* to the warden of the *Fleet*, marshal of *B. R.*, or keeper of an inferior prison, shall be returned into court at a day certain.

If upon an *habeas corpus* the prisoner be returned to be charged with process out of *B. R.* or *C. B.*, he shall be committed with those causes, tho' the process in *B. R.* or *C. B.* was returnable at a future day.

Bail in an *Habeas Corpus*.

*Vide Bail* (I).

## H A B E N D U M.

*Vide Fait*, (E 9, 10.)

## HABERE FACIAS POSSESSIONEM.

*Vide Execution*, (A 5.)

## HABERE FACIAS SEISINAM.

*Vide Execution*, (A 2, 3.)

## H A M L E T.

*Vide Parish.*

## H A R E S.

*Vide Justices of Peace*, (B 49.)

## H A V E N.

*Vide Navigation* (D).

## H A W K I N G.

*Vide Chase*, (H 1, &c.)—*Justices of Peace*, (B 45.)

## H A Y.

*Vide Dismes*, (H 2.)

## H E A R I N G.

*Vide Chancery*, (M—S—T 1, &c.—Y 5.)

## H E I R.

## (A) Heir.

**W**HEN, and who shall take by descent, and who shall be heir, who not, *vide in Descent*, (A—B—C 1, &c.)

When he shall be bound to the debt of his ancestor, *vide Assets* (A—B).—*Covenant*, (C 2.)—*Chancery*, (2 G 1, &c.—3 P 1, &c.)—*Pleader*, (2 E 1, &c.)

If the person of the ancestor be bound in respect of his land, which descends to the heir, he shall be charged: as if, by a subsidy to be assessed upon every one having 20*s. per annum*, A. be charged and die; his heir shall pay it, for it runs with the land. *R. Mo. 17.*

*Heir* is *nomen collectivum*; and therefore, if a condition be, *that if his heir does not pay such a rent-charge, the estate shall go to B.*, if the heir of the heir does not pay, the condition is broken. *R. 2 Cro. 145.*

What goods and chattels go to the heir, *vide Biens* (B).

*Vide more concerning Heir in Abatement*, (F 9.)—*Copyhold*, (D 2.)—*Covenant*, (B 2.)—*Devise*, (N 22.)—*Dett*, (G 5.)—*Escheat*, (A 1.)—*Estates*, (B 8.)—*Guardian, per Totum*.—*Idiot*, (D 5.)—*Parceners*, (A 3.)—*Pleader*, (3 L 13.)

## H E M P.

*Vide Difies*, (H 13.)

## H E R A L D.

*Vide Courts*, (E 3.)—*Norroy* (A—B).

## H E R E D I T A M E N T.

*Vide Grant*, (E 1.)

## H E R E S Y.

## (A) What shall be.

**B**Y the *stat. 1 El. 1.* no determination, &c. for any matter of religion, or cause ecclesiastical, made by authority of that present parliament, shall be deemed, or adjudged heresy, schism, or schismatical opinion.

And persons, to whom the queen, her heirs or successors, shall by letters patent, &c. give authority to correct, &c. errors, heresies, &c. shall not have authority to determine or adjudge any matter heresy, but such as heretofore hath been adjudged heresy by the authority of the canonical scriptures, or by the first four general councils, or any of them, or by any other general council wherein the same was declared heresy by the express and plain words of the canonical scriptures, or such as shall hereafter be adjudged heresy by parliament with assent of the clergy in convocation.

But no statute determines what shall be heresy. *H. P. C. 3.*

The *§. 2 H. 4. 15.* (which is now repealed) calls, opinions contrary to the catholic faith, and determination of holy church, heretical opinions.

The *§. 31 H. 8. 14.* enacts, that a maintainer of an opinion against the first of the six articles shall be adjudged an heretic; and the *§. 34 H. 1.* if he maintain any thing against the instructions or determinations of the king made or to be made, for the third offence.— But these are now repealed.

By the canon law he was held an heretic, *qui docet aut sentit de articulis fidei aut sacrament. aliter quam sancta ecclesia.* *Lind. 299. v. Declarentur.*

*Vel per quosdam, contra doctrinam ecclesie licet non in articulis fidei.* *Lind. 292, 3.*

*Per alios, qui errat in expositione sacre scripturae, aut contemnit servare quod ecclesia statuit.* *Lind. 292.*

By the divines, heresy is nothing else but a doctrine repugnant to some article of the Christian faith, and such is plain and formal heresy. *Chillingworth, 199.*

By the common law, heresy is, *malvies & faux crime ou error en droit foy Christian.* *Mir. 22.*

### (B) How punished.

(B 1.) Who have Consuance of Heresy.

(B 1.) *Convocation.*] **BY** the common law, a conviction for heresy was before the archbishops and bishops in a general synod. *H. P. C. 5.*

And therefore, the archbishop and his province in convocation may and use to convict for heresy by the common law. *F. N. B. 269. D. Bro. Heresy, 1. 12 Co. 56.*

And the conviction was by the archbishop *de consensu & assensu ac consilio episcoporum, & confratrum suffragantium suorum, necnon totius cleri provincie sue in concilio suo provinciali congregat.* *Vide Breve de Heret. Comb. F. N. B. 269. C.*

And therefore, the convocation has jurisdiction of heresy. *4 Inst. 322.*

And may issue a citation against the offender. *Keil. 182. b.*

In a cause of heresy, the convocation proceeds *juxta legem divinam & canones sancte ecclesie.* *4 Inst. 322.*

(B 2.) *Archbishop.*] So, the archbishop, as ordinary, has jurisdiction of heresy.

So, where, upon default or assent of the ordinary, the cause is transmitted to the archbishop pursuant to the *§. 23 H. 8. 9. H. P. C. 5.*

(B 3.) *Other ordinary.*] So, by the common law, the ordinary may proceed against an heretic within his diocese *pro salute anime,* *12 Co. 57. H. P. C. 5.*

So, by the *§. 2 H. 4. 15.* the ordinary in his own diocese might cause any suspected of heresy to be arrested and detained in custody till he had purged himself or recanted; and by himself or commissaries might proceed judicially against him, and in three months after



after arrest determine the same according to the order of the canon law.

By the *st.* 2 *H.* 5. 7. persons indicted for heresy before justices of *B. R.*, of assize, or peace, and thereon taken by *capias*, shall be delivered to the ordinary of the place, or their commissaries by indictment in ten days after arrest, to be by them acquitted, or convicted of the said heresies according to the laws of holy church. Provided such indictment be not taken in evidence but only for information: by the judges spiritual, and that the ordinary shall begin his process in the same manner, as if no such indictment were.

By the *st.* 31 *H.* 8. 14. commissioners shall be awarded to the bishop of the diocese, his chancellor and commissary, &c. to inquire of the heresy mentioned in that act.

And by the *st.* 32 *H.* 8. 15. such commissions shall comprehend archdeacons and their officials by their names of office and dignity, and not by their christian and surnames.

By the *st.* 35 *H.* 8. 5. none shall be tried for heresy, &c. by the six articles in *st.* 31 *H.* 8. 14. but on accusation by the oath of twelve men, or indictment before commissioners.

By the *st.* 25 *H.* 8. 14. (which repeals the *st.* 2 *H.* 4. 15.) a person indicted for heresy, or accused by two witnesses, may be cited and committed by the ordinary to answer in open court, &c.

But by the *st.* 1 *Ed.* 6. 12. the statutes 2 *H.* 5. 7. and 31 *H.* 8. 14. are repealed by express words, and by the general words *all acts of parliament concerning religion or opinions*, the statutes 2 *H.* 4. 15. and 32 *H.* 8. 15. are repealed also.—So, by the express words, the statutes after mentioned; 5 *R.* 2. 5. 25 *H.* 8. 14. 34 *H.* 8. 1. and 35 *H.* 8. 5. are now repealed. 12 *Co.* 57. *Vide post.* (B 6.)

By the *st.* 13 *Car.* 2. 12. (which repeals the whole *st.* 16 *Car.* 1. 11. except so much as relates to the high commission court,) the archbishop, bishop, &c. may determine, exercise, &c. all ecclesiastical jurisdiction, and all censures, coercions, &c. belonging to the same before the *st.* 16 *Car.* 1. and in all causes, &c. according to the king's ecclesiastical laws.

And by the *st.* 29 *Car.* 2. 9. (which takes away the writ *de heretico comburendo*) nothing in that act shall extend to take away or abridge the jurisdiction of the protestant archbishops, bishops, &c. in cases of atheism, blasphemy, heresy, or schism, &c. but that they may proceed to punish the same according to the king's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures not extending to death, in such sort, and other, as they might have done before the said act.

(B 4.) *Temporal judge.*] By the *st.* 2 *H.* 5. 7. (which is now repealed) the justices of *B. R.*, assize, or of the peace, might inquire of all heresies, &c. and on indictment for such offence might award a *capias*, and, when the party was taken, deliver him to the ordinary, &c.

By the *st.* 31 *H.* 8. 14. commissioners were to be awarded to justices of peace, stewards of leets, under-stewards, &c. to inquire of all heresies, felonies, &c. by that act; but this also is now repealed.

By the *st.* 25 *H.* 8. 14. sheriffs in turns, and stewards in leets, might

might inquire of heretics, and the presentment in the turn or tect was to be certified to the ordinary. But this act also is now repealed.

So, by the *st. 1 El. 1.* the queen by letters patent might authorise such persons being natural-born subjects as she should think fit, &c. to redress, &c. all such errors, heresies, &c. as by any ecclesiastical authority, &c. might be lawfully reformed.

And thereupon the commissioners had conuſance of heresy.

But now, by the *st. 16 Car. 1. 11.* this clause of the *st. 1 El. &c.* shall be repealed,

(B 5.) Who have not Conuſance.

But generally, heresy could not be tried by the temporal judge, by indictment, or otherwise. *H. P. C. 4. 27 H. 8. 14. b.*

For by the *st. circ. agatis 13 Ed. 1.* court christian is allowed conuſance *de his quæ sunt mere spiritualia*, which are, heresy, schism, &c. *2 Inst. 488.*

Yet, the temporal judge may take conuſance, what offence is not heresy, and shall adjudge thereon, whether it be heresy or not. *H. P. C. 4. 1 Rol. 110.*

So, if an indictment be found for heresy, the judge may certify to the ordinary, and the indictment shall be evidence against the indicted. *27 H. 8. 14. b.*

(B 6.) What Penalty shall be inflicted.

By the common law, the punishment of heresy before the ordinary was only by ecclesiastical censures. *12 Co. 57.*

And no forfeiture was incurred thereby; for the prosecution was intended only *pro salute animæ*. *H. P. C. 5.*

And the writ *de hæretico comburendo* does not lie upon it; for the law does not allow the destruction of the life of a man upon a conviction before a single judge. *Semb. cont. F. N. B. 269. C. acc. 12 Co. 57. Cert. cont. by some judges, but said, that it was clearly acc. 12 Co. 93. Braet. lib. 3. c. 9. fo. 123, 124.*

*Mir. 22.* only says, that an heretic is removeable from the community of the holy people of God; and *Britt. c. 9.* says, that miscreants are burnt, but does not say how convicted. And the writ *de hæretico comb.* speaks only of an heretic convicted by the archbishop in convocation; with which *Fitzh.* agrees. *F. N. B. 269. C. D.*

But by the *st. 5 R. 2. 5.* commissions might be directed to sheriffs, &c. to imprison such whom the ordinary should certify to be heretics, till they justified themselves according to the laws of holy church.—But to this statute the commons never assented. *12 Co. 57, 58.*

So, by the common law, a man convicted of heresy by the archbishop in his provincial synod, or convocation, might be burnt by the writ *de hæretico comburendo*, if he had abjured before, and was then relapsed. *F. N. B. 269. B. C. D.*

So, upon the first conviction, if he refuse abjuration; otherwise, if he will abjure. *Fitz.* says, he ought to be first convicted and abjured. *F. N. B. 269. B.* But *per Bro.* it is sufficient, that he refuse abjuration. *Bro. Heresy, 1.* There is a *qu.* in the margin. *Vide the st. 2 H. 4. 15. 2a. 12 Co. 58.*

Yet,

Yet, *Sawtre* seems to be the first man burnt for heresy in England, and the writ *de heretico combdo.* formed in his case. *Fox's Martyr.* 502. (8th edition 675.) *F. N. B.* 269. C.

By the *st.* 2 *H.* 4. 15. the ordinary might keep a convict in any of his own prisons as long as he thought fit, and might fine, &c. or, if he refuse to abjure, or after abjuration relapse, (in which case by the canon law he ought to be left to the secular power,) the sheriff, mayor, &c. who should be present, if required, with the ordinary, or his commissary, at giving sentence, should take the convict, and cause him to be openly burned. *Vide the st. printed, Fox M.* 507. (8th edition 682.)

By this statute, if the sheriff was present, he might burn him without the writ *de heretico combdo.* *R. Bro. Heresy,* 1. 12 Co. 56. *F. N. B.* 269. D.

Otherwise, if the sheriff, &c. was absent at the sentence. *Bro. Heresy,* 1. 12 Co. 56.

And by the *st.* 25 *H.* 8. 14. (which repeals the *st.* 2 *H.* 4. 15.) upon a conviction before the ordinary, there must be the writ *de heretico combdo.* *F. N. B.* 269. D. 12 Co. 57.

By the *st.* 2 *H.* 5. 7. a convict of heresy was to forfeit his lands in fee, and all his goods and chattels. *Vide Fox M.* 549. (8th edition 742.)

By the *st.* 34 *H.* 8. 1. he was to forfeit his goods and chattels for heresy by that act.

By the *st.* 25 *H.* 8. 14. a convict, if he refuse to abjure or after relapse, was to be burnt: and this statute repeals the 2 *H.* 4. 15.

Then, by the express words of the *st.* 1 *Ed.* 6. 12. the statutes 5 *R.* 2. 5. 2 *H.* 5. 7. 25 *H.* 8. 14. 31 *H.* 8. 14. 34 *H.* 8. 1. and 35 *H.* 8. 5. are repealed; and by the general words, *all statutes concerning religion or opinions*, the *st.* 2 *H.* 4. 15. (which was revived by the repeal of the *st.* 25 *H.* 8. 14.) and the *st.* 32 *H.* 8. 10. 15. are also repealed. But by the *st.* 1 & 2 *Ph.* & *M.* 6. the statutes 5 *R.* 2. 5. 2 *H.* 4. 15. and 2 *H.* 5. 7. were revived; and afterwards repealed by the *st.* 1 *El.* 1. 12 Co. 57.

And so the writ *de heretico comburendo* did not lie upon a conviction before the ordinary, but only upon a conviction before the archbishop in his provincial synod, or convocation. 12 Co. 57.

Or, upon a conviction before high commissioners. 12 Co. 58.

But now, by the *st.* 29 *Car.* 2. 9. the writ *de heretico comburendo* with all process thereon in order to execute such writ, and all punishment by death in pursuance of any ecclesiastical censure, shall be utterly abolished.

And before the *st.* 2 *H.* 4. 15. if an heretic condemned was left to the secular power, the king might pardon him if he pleased. *F. N. B.* 269. B.

## HERIOT.

*Vide Copyhold, (K 18, &c.)*

## HIGH CHAMBERLAIN.

*Vide Officer, (E 7.)*



## HIGH CHANCELLOR.

*Vide Chancery, (B 1.)—Justices, (K 8.)*

## HIGH CONSTABLE.

*Vide Officer, (E 2.)*

## HIGH STEWARD.

*Vide Officer, (E 4, &c.)*

## HIGH TREASURER.

*Vide Officer, (E 1.)—Justices, (K 8.)*

## HIGH TREASON.

*Vide Forfeiture, (B 1, 2.)—Justices, (K 1, &c.—X 1.—Y 3.)—Utter-gary, (D 1.)*

## HIGH-WAY.

*Vide Chimin, (A 1, &c.—B 1, &c.—C 1, &c.)*

## HOLY ORDERS.

*Vide Parson, (B 1.)*

## H O M A G E.

## (A) By what Tenures Land is holden.

**A**LL lands in *England* are holden mediately or immediately of the king by some tenure, or service. *Co. L. 1. 2 Inst. 501. Vide Tenure (A).*

Every tenure is spiritual; as, by *frankalmoigne*.

Or, temporal: as, homage, fealty, escuage, grand or petit serjeanty, knight's service, and socage. *Co. L. 64.*

To which may be added, tenures in burgage, and villenage. *Co. L. 64.*

## (B) What are taken away.

**B**UT by the *st. 12 Car. 2. 24.* all tenures by homage, escuage, *voyages royal*, and charges incident to the same, by knight's service of the king or a common person, by knight's service or socage *in capite*, and all wardships, liveries, *primer seifins*, *ouster lemainis*, values and forfeitures of marriage, mean rates, fines for alienation, pardons and seizures for alienations, *aide pur faire fitz chivaler*, & *file marier*, and all charges incident to or arising from any of them be taken away: and all tenures turned into free and common socage.

And all tenures created by the king for the future shall be common socage, notwithstanding any reservation, &c.

## (C) Homage; What.

**HOMAGE** is the most honourable and humble service that a freeholder can do to his lord. *Lit. f. 85.*

If a layman does homage, he being ungirt and uncovered shall kneel before his lord, when sitting, and shall hold his hands between the hands of the lord, and shall say, *I become your man of life and limb, and will be faithful and loyal to you for the tenements which I claim to hold of you, saving the faith which I owe to our lord the king; and then the lord so sitting shall kiss him.* *Lit. f. 85.*

If an abbot or other man of religion, or a *feme-sole*, does homage, they do not say, *I become your man or woman, &c.* but *I do homage to you, and will be faithful, &c.* *Lit. f. 86, 87.*

If a woman who holds by homage, takes husband, before issue the husband and wife shall do homage, and the husband shall say, *we do homage to you, and will be faithful, &c.* *Lit. f. 88. Co. L. 66. a.*

After issue, the husband alone in the life of his wife shall do homage. *Lit. f. 90.*

If there are co-heirs, who hold of the king and are of full age, each of them shall do homage. *Co. L. 67. a.*

If they are within age, or hold of a common person, the eldest shall do homage for herself and her sisters. *Ibid.*

## (C 2.) Homage Ancestrel.

If a tenant and his ancestors time out of mind, &c. have held their tenements by homage of the lord and his ancestors, and have done homage, it shall be called, *homage ancestrel.* *Lit. f. 143.*

## (D) Fealty.

**FEALTY** is a service, which every tenant ought to pay to his lord, except tenant in *frankalmoigne.* *Co. L. 67. b. 95. b.*

Tho' he be only tenant for life, or years. *Lit. f. 93. Co. L. 67. b.*

Tho' he be tenant in *frank-marriage.* *Lit. f. 138.*

So, if tenant in *frankalmoigne* alien to a secular man, he shall do fealty. *Lit. f. 139.*

A freeholder, when he does fealty, swears *to be faithful and loyal to his lord for the tenements which he claims to hold of him, and to do the customs and services which he ought to do at the terms assigned.* *Lit. f. 91.*

A villein swears, *that he will be faithful and loyal, &c. and will be justified by him in body and goods.* *Co. L. 68. a.*

And fealty may be done to the steward or bailiff, as well as to the lord himself. *Lit. f. 92.*

But fealty must be done in person, and not by attorney. *Co. L. 68.*

## (E) Escuage.

**H**<sup>E</sup> that holds his land by *Escuage*, holds by knight's service. *Lit. f. 95,*

## (F) Grand Serjeanty.

**G**RAND Serjeanty is, when a man holds lands to do a special service in his person to the king; as, to carry the king's banner, lance, &c. *Lit. f. 153.*

Or, to be his marshal, or conductor of his army. *Lit. f. 153.*

To be sewer, carver, butler, &c. to the king at his coronation. *Lit. f. 153.*

To carry his sword before him at his coronation. *Ibid.*

To be chamberlain of the receipt of the king's Exchequer. *Ibid.*

Or, to be chamberlain, steward, constable, &c. of England. *Co. L. 106. Dy. 285. b.*

## (G 1.) Knight's Service.

**T**HE service of *chivalry* is, when land is given to another *tenendum per servitium unius militis*, or without rendering other service; for then the tenure shall be of the king by knight's service *in capite*. *Wri. Int. 140.*

And if the tenure be by homage, fealty, and escuage, that is a tenure by knight's service. *Lit. f. 103.*

## (G 2.) What Incidents belong to it.

Tenure in *chivalry* draws to it ward, marriage, and relief. *Lit. f. 103.*

So, homage, fealty, and escuage are incident to such a tenure. *Co. L. 76. a.*

So, aid to the king *pur faire fitz chivaler*, or *file marier*.

For if tenant by *chivalry* dies, his heir male within age, his lord shall have the ward of the heir till his age of twenty-one years: and if the heir be female he shall have the ward of her till her age of fourteen. And by the *st. W. 1. 22.* till her age of sixteen years; and if such heir be not married, the lord shall have the marriage also of such heir male or female. *Lit. f. 103.*

If the heir male be of full age, or the female of the age of fourteen, at the death of the ancestor, they shall not be in ward, but shall pay relief to the lord. *Ibid.*

By the *st. 32 H. 8. 1.* and *34 H. 8. 5.* he which holdeth lands by knight's service may, by act executed in his lifetime, or by his last will in writing dispose of two parts thereof. But the lord's wardship of the third part is saved. (*Vide Co. L. 76. a.*)

By the *st. of Marl. 6.* if a father enfeoff his son, the lord shall not lose his wardship. *2 Inst. 109.*

So, if the grandfather, after the death of the father, enfeoff his son, or any descendant, in a right line. *2 Cro. 157.*

Or, if the father was alive, but dies in the life of the grandfather. *Ibid.*

So, if there be a term for years to pay the debts of the father, and he grants the reversion to a stranger. *R. 2 Cro. 157.*

Otherwise, if the father survive the grandfather, for then he was not heir. *2 Cro. 157.*



(G 3.) *Remedy for these incidents.*] After the death of the king's tenant, who holds *in capite* by knight's service or socage, or who holds of a bishop by knight's service, when the temporalities are in the king's hands, &c. the escheator *ex officio*, or upon a writ of *diem clausit extremum* within the year, or upon a writ of *mandamus* afterwards, may inquire what lands the tenant had at his death, and of what value, who was his heir, and of what age. *F. N. B. 252, 253. Ley, Livery, 20. Vide Guardian, (H 1, &c.)*

An inquisition *ex officio*, if it be uncertain, shall be void; if taken upon the writ of *diem clausit extremum*, and it is defective, there shall be a *melius inquirendum*. *F. N. B. 255.*

If any lands are omitted, there shall be a writ of *que plura*. *F. N. B. 255. Ley, Livery, 20.*

So, the heir upon the death of his ancestor may sue a special commission to inquire *ut supra*, which shall be of the same effect as an inquisition upon a writ of *diem clausit extremum*. *F. N. B. 253. D.*

If the escheator die, or be removed after the writ of *diem clausit extremum* before inquisition taken, there shall be another writ of the same nature called, *datum est nobis intelligi*. *F. N. B. 253.*

If after inquisition and before return, it shall be transmitted by *certiorari*. *F. N. B. 253.*

If the heir be found by the office, within age, he ought to have an *estate probanda* before livery. *Ley, Livery, 21. F. N. B. 253, 254.*

If he be of full age, and so found, he may sue livery without the writ of *estate probanda*. *Ley, Livery, 20.*

Otherwise, if found within age, tho' in truth he was of full age. *Ley, Wards and Liveries, 27.*

(G 4.) Who is compellable to be a Knight.

The king could compel a man that had an inheritance of 40 *l. per annum* to be a knight, or that he should be fined. *2 Rol. 167. l. 20. 45.*

So, every one who had 20 *l. per annum*, or *integrum feodum militis valens 20 l. per annum*. *2 Rol. 167. l. 50. 168. l. 7.*

Tho' it was land of socage-tenure. *2 Rol. 168. l. 35.*

And if he would not be a knight, the king could command the sheriff to distrain for the fine. *2 Rol. 167. l. 41. 46.*

But by the *st. 1 Ed. 2. 1.* a man, who had 20 *l. per annum* in *antient demesne* as *sokeman*, was not distrainable to be a knight. *2 Rol. 168. l. 27.*

And now, by the *st. 16 Car. 1. 20.* no person shall be distrained, or compelled, &c. to take on him the order of knighthood, or suffer any fine, trouble, &c. And all process, &c. for that intent shall be void.

## (H) Socage.

**T**ENURE by *socage* is, where a man holds lands by fealty and rent, or any other service, not being knight's service for all manner of services. *Lit. f. 117.*

Or, by homage, fealty and rent: for homage by itself does not make knight's service. *Lit. f. 117.*

## HOMICIDE.

*Vide Appeal, (A 1.)—Justices, (M 1, &c. 14. 18, &c. 20.)*

## HOMINE REPLEGIANDO.

*Vide Imprisonment, (L 4.)*

## HONOUR.

(A) Honour; What shall be.

**A**N honour ought to consist of lands, liberties and franchises.  
1 *Bul.* 197. 2 *Rol.* 72. l. 48.

And it is the most noble feigniory. *Co. L.* 108. a.

So, one or more manors may be parcel of an honour. 2 *Rol.* 72. l. 45. *Vide Grant, (E 4.)*

So, a forest may be appendant to it. 2 *Rol.* 73. l. 3.

An honour originally shall be created by the king. *Co. L.* 108. a.

Every honour must be holden of the king. *R.* 1 *Bul.* 195.

And if it be assigned, or granted over to another, it shall not be holden of a subject. *R.* 1 *Bul.* 195.

For it may be granted by the king to a subject. *Co. L.* 108. a.

A man may claim an honour by grant, or by prescription. *R.* 1 *Bul.* 195.

But the king at this day cannot make an honour by grant, without an act of parliament. *R.* 1 *Bul.* 196. *Co. L.* 108. a.

There are within the realm eighty honours, viz. the honour of *Aquila, Arundell, Abergavenny, Boloine, Berkhamsted, Beaulieu, Barnard's Castle, Bullingbroke, Barstable, Bononia, Brecknock, Brember, Bedford, Clare, Croveure, Clun, Christchurch, Cockermouth, Cormayls, Candicut, Carisbrook, Clifford-Castle, Chester, Carmarthen, and Cardigan, Dudley, and Dover-Castle, Eye, and Egremont.*

The honour of *East and West Greenwich, Gloucester, Gretnesnil, Gower, Haganet, Huntingdon, Heveningham, Hawenden-Castle, Hertford, and Halton, Lancaster, Lincoln, Leicester, Lovetot, Hinckley, and Kington, and Folkingham.*

The honour of *Montgomery, Mowbray, Middleham, and Maidstone, Nottingham, Newelhn, Oakhampton, and Oxford.*

The honour of *Plimpton, Peverel, Pickering, Raleigh, Richard's Castle, Skipton, Stafford, Strigal, Tickhil, Tremanton, Totness, Theony, Tamworth.*

The honour of *Wigmore, Wallingford, Windsor, Wormgay, Whirwelton, Werk, Whitcubh, and Warwick, Webley, and Tutbury, [by the stat. 31 H. 8. 5. Hampton Court,] Woodstock.*

So, by the *st.* 33 H. 8. 37, 38. *Ampthill, and Grafton.*

By the *st.* 37 H. 8. 18. *Westminster, Kingston on Hull, St. Qysyth, and Dennington Castle.*

*Vide Dignity.—Prærogative, (D 31.)*

## HOSPITAL.

## (A) Hospitals.

**H**OSPITALS are aggregate, in which, the master, or warden and his brethren have the estate of inheritance; or sole, in which the master, &c. only has the estate in him, and the brethren or sisters, having college, and common seal in them, must consent, or the master alone has the estate not having college, or common seal. *Co. L. 342. a.*

So, hospitals are eligible, donative, or presentative. *Co. L. 342. a.*

The master of an hospital, who has college, and common seal, may have a writ of right; for the right, and inheritance is in him. *Co. L. 341. b.*

If he has no college, or common seal, he may have a *juris utrum*. *Co. L. 342. a.*

## (B) What are dissolved and given to the King.

**B**Y the *stat. 27 H. 8. 28.* the king shall have and enjoy to him and his heirs for ever all monasteries, priories, and other religious houses, not having in lands, &c. above the clear yearly value of 200*l.* and all manors, granges, meases, &c. belonging to them; and also all monasteries, abbeys, and priories, which within one year before were granted to him, or otherwise suppressed and dissolved, and all manors, &c. belonging to them.

By the *stat. 31 H. 8. 13.* the king shall have and enjoy, to him, his heirs and successors, all monasteries, &c. hospitals, &c. and other religious and ecclesiastical houses before dissolved, or given up, or thereafter to be dissolved, or given up.

## (C) What not.

**B**UT no lay hospital was given to the king by these statutes, but religious and ecclesiastical hospitals only. *Co. L. 342. a.*

Tho' after foundation, or when founded, it was ordained that a priest should be maintained to celebrate divine service, or to pray for the soul of the founder or others, and the poor of the hospital to join with him. *Co. L. 342. a.*

So, by the *stat. 37 H. 8. 4.* no hospital was given to the king, except where the donor, &c. had expelled the priests, wardens, &c. between 4th February 27 H. 8. and 25th December 37 H. 8. or where king H. 8. by commission, &c. had seized it. *Co. 342. a.*

So, by the *stat. 1 Ed. 6. 14.* no hospital was given to the king, lay, or religious. *Co. L. 342.*

## HOSTLER, or INN-KEEPER.

*Vide Action upon the Case for Negligence, (B 1, &c.)—Pleader (2 Q).*

## HOTCH-POT.

*Vide Guardian, (G 2.)—Parceners, (C 4.)*



## HOUSE OF CORRECTION.

*Vide Justices of Peace, (B 82, 83.)—Uses, (N 6.)*

## HOUSEHOLD OFFICERS.

*Vide Officer (F).*

## HUE AND CRY.

*Vide Hundred, (C 1, &c.)—Pleader, (2 S. 1, &c.)*

## HUNDRED.

(A) Hundred; to whom it belongs.

**K**ING *Alfred* divided his realm into counties or shires, and the county into hundreds. *Ray. 363.*

Every hundred originally was parcel of the possessions of the king, and belonged to the king. *1 Vent. 403. 2 Rol. 73. B. 11 H. 4. 89. b.*

And the king had granted it to others in fee, for life, or in ferm. *Per Hale, 1 Vent. 404. 2 Rol. 73. l. 32.*

And when granted to a subject, it is a franchise, or liberty. *4 Mod. 343. 1 Vent. 405.*

So, a subject may have it by grant, or prescription. *2 Rol. 73. l. 35. 11 H. 4. 89. b.*

Or, by *disseisin*. *2 Rol. 73. l. 40.*

Or, as appurtenant to his manor. *2 Rol. 73. l. 50.*

But by the *st. 2 Ed. 3. 12.* hundreds and wapentakes let to ferm by king *Ed. 3.* for term of life or otherwise, which were sometimes annexed to the fermes of the counties, shall be adjoined again to the counties, and from henceforth shall not be severed from them.

And by the *st. 14 Ed. 3. 9.* all wapentakes and hundreds, which be severed from the counties, shall be rejoined to them, as before this time hath been established by another statute; and that the sheriffs hold the same in their own hands, &c.

And therefore, since these statutes, the bailiwick of the hundred belongs to the sheriff. *R. Ray. 364, 5.*

And it cannot be severed from the county by a grant of the king. *1 Vent. 411. R. Skin. 41. 2 Jon. 194.*

*Vide Justices of Peace, (B 67.)*

(B) Hundred Court.

**T**HE hundred court was derived out of the county court, and is of the same nature with the county-court, or court-baron. *2 Inst. 71. 4 Inst. 267.*

By the king's grant *18 H. 3.* where it was held from fortnight to fortnight, it shall be now held from three weeks to three weeks. *Brady's Appendix to Hist. of England, No. 234.*

*Vide County, (C 1, &c.)—Dismes, (M 5.)*

## (C) Hue and Cry.

## (C 1.) How made.

**B**y the *st. Wint. 13 Ed. 1.* 1, 2. *crie serra fait en county, hundred, &c. et chescun pais serra issint garde, que maintenant apres robbery ou felony fait, fresh suit serra de vill en vill, et de pais en pais, &c.*

*Et pais n' avera, plus long temps que 40 jours, deisnque face gree de la robbery, ou del misfait, ou respondra corps, des misfeasors.*

By the *st. 8 G. 2.* 16. every constable, to whom notice is given or left at his house of a robbery, &c. and every constable of the hundred, or constable, &c. in any town, parish, &c. within the hundred, on notice from the party robbed or otherwise, shall with all expedition make hue and cry after the felon, &c. on pain of 5 *l.* for neglect, a moiety to the king, a moiety to him that sues in six months, to be recovered with full costs.

(C 2.) Action against the Hundred upon the *st. of Wint. 13 Ed. 1.*

(C 2.) *When it lies.*] By construction upon the *st. Wint. 13 Ed. 1.* if the country does not apprehend the felons within forty days, an action lies against the inhabitants of the hundred, where the robbery was committed, for the money or goods whereof the party was robbed.

If the robbery was in the division of several hundreds, the action shall be against the inhabitants of both hundreds. *Vide st. Wint. 2.*

So, if the robbery was in the half hundred of *W.* it may be against the inhabitants *in hundredo vocato, the half hundred of W.* for that is an hundred of itself. *1 Brownl. 156.*

Or, if it be against the inhabitants *in dimid. hundred. de W.* it will be well. *R. 1 Brownl. 156.*

If a man be assaulted in the hundred of *A.* and flies into the hundred of *B.* and there is robbed, the action shall be against the hundred of *B.* alone. *R. Hut. 125.*

But if he be seized by a robber in the hundred of *A.* and carried to the hundred of *B.* and there robbed, it shall be against the hundred of *A.* *Dist. 1 Sid. 367. R. cont.* for it shall be against the hundred where he was robbed. *Sal. 614.*

An action lies against the hundred, tho' no hue and cry was levied; for that is the part of the hundred. *Adm. cont. Bend. pl. 157. Semb. acc. 2 Leo. 82. 174. 7 Co. 6. a. 1 And. 159.*

So, it lies, if a waggon be driven out of the highway by day, tho' it be not robbed till night. *1 Sid. 263.*

So, if a robbery be after sun-set, if the robber can be known and distinguished. *7 Co. 6. a. R. 1 And. 159. Sti. 233.*

And it is not a cause for a new trial, that the verdict was for the plaintiff; when it is dubious, whether it was day or night. *1 Sid. 263.*

So, it lies, if the robbery be upon the dawning of the day, when it is convenient for travelling. *R. Cro. El. 270. R. 2 Gro. 106.*

If notice of the robbery was given in another hundred adjoining; for he being a stranger does not know the limits of the hundred. *R. Noy, 155. R. 1 And. 159.*

If he says, *that he was robbed*, to one who inquires what is the matter, it is sufficient notice. *R. Noy, 155.*

Tho' he refuses his horse for pursuit of the robbers. *R. Noy, 155. Mar. pl. 28.*

Tho' the notice was five miles from the place of the robbery. *R. Mar. pl. 28.*

So, an action lies against the hundred, tho' the felony be not committed in the highway. *R. 1 Mod. 221. Per cur. cont. Sho. 60.*

[It lies, tho' plaintiff, after the robbery, passes by a place where there are two constables, without giving notice, if he did not know of them, tho' he did not inquire. *Semb. Whitworth v. Hundred of Grimshoe, T. 32 & 33 G. 2. H. 33 G. 2. Wilf. 105. 109.*]

(C 3.) *By whom.*] The action regularly shall be by the owner of the goods.

If a servant be robbed, the master may maintain the action. *R. Cro. Car. 38. Adm. 3 Mod. 287. D. Latch, 127. Sti. 156. 4 Mod. 305.*

Or, the servant may maintain the action, tho' robbed of the money of another. *Adm. 2 Leo. 82. R. 1 Brownl. 155. R. 4 Mod. 305. Sal. 613, 614.*

So, if the servant deliver money of his master to *A.*, and the servant and *A.* are both robbed together; the servant may maintain the action for the whole. *3 Mod. 288, 289.*

By the *st. 8 Geo. 2. 16.* process against the hundred shall be served only on the high constable of the hundred, who shall give public notice of it in some market town of the hundred the next market day, or if no market in the hundred, in some parish church after divine service, and enter an appearance, and defend the suit for the hundred.

(C 4.) *When it does not lie.*] But an action does not lie against the hundred for a robbery within an house; for every one ought to defend his house at his peril. *R. 7 Co. 6. a. R. Cro. El. 753. R. Mo. 620. R. 3 Leo. 262.*

Tho' taken in the highway, and afterwards carried into an house, and there robbed. *Semb. Sal. 615.*

Nor, for a robbery in the night; for that is not convenient for travelling. *R. 7 Co. 6. a. Mo. 620. 1 Leo. 57. 1 And. 159.*

Nor, in the morning *ante lucem.* *R. 7 Co. 6. b. Sav. 83. Sti. 233.*

Tho' taken in the day, and afterwards robbed in the night. *Semb. Sal. 615.*

So, tho' it lies, without notice of the robbery by the party to the hundred since the *st. of Winton, 7 Co. 6. 2 Leo. 174.*

Yet, by the *st. 27 El. 13.* the action does not lie, unless the party, with as much convenient speed as may be, make known the robbery to some near town, village, or hamlet.

And he ought to give notice as soon as he can. *R. Noy, 155.*

Nor, by the *st. 8 Geo. 2. 16.* unless, with as much convenient speed as may be, he give notice to the constable of the hundred, or some constable of parish, &c. near the place of robbery, or leave notice at his dwelling-house in writing, describing the felon, time, and place



place of the robbery, and in twenty days after the robbery give notice in the *London Gazette*, describing the felon, time, and place of robbery, goods and effects of which he was robbed.

[If bank-notes are not well described, (by dates, numbers, &c. he remembering them, *qu.* if he does not?) plaintiff shall recover neither for them, nor any other thing, tho' well described, *semb.* *Barnes*, 458.]

[If a material description of one of the robbers is not mentioned in the Gazette, as that he had *particular large red eye-brows.* *Ibid.*]

[If the whole sum of which the plaintiff is robbed is not mentioned in the Gazette, *semb.* *Whitworth v. Hundred of Grimsboe*, T. 32 & 33 G. 2. 2 *Will.* 105. 109.]

But it is sufficient to give notice to the next town in the high road, tho' a town on the side be nearer. *Noy*, 52. 1 *And.* 158. 1 *Leo.* 57.

Tho' the town to which notice is given is out of the hundred. *Noy*, 52. 1 *And.* 159. 1 *Leo.* 57.

[If a man is robbed soon after six, rides thro' a village without giving notice, tells men on the road, at seven gives notice to an inn-keeper at a town two miles and an half off, and then gives notice to the high constable three miles off, between eight and nine o'clock; it is good notice, within 8 G. 2. c. 16. *Ball v. Hundred of Weymersley*, M. 16 G. 2. *Str.* 1170.]

So, by the *st. of Wint.* the country has forty days to answer for the bodies of the malefactors; and therefore it is bad, if the original be teste'd within forty days after the robbery committed.

So, by the *st.* 27 *El.* 13. the action does not lie against the hundred, if it be not prosecuted within a year after the robbery committed.

And the year shall be taken, inclusive of the day of the robbery. *R. per two J. Warb. cont. Hob.* 139. 2 *Rol.* 520. l. 47. *R.* 1 *Brownl.* 156. *Vide Temps* (A).

So, it does not lie, if the robbery be not in the highway. *R. Sho.* 60. *R. cont.* 1 *Mod.* 221. *Vide ante*, (C 2.)

So, tho' upon the *st. of Wint.* the action lay, if all the robbers were not taken. *D.* 7 *Co.* 7. a. *R.* 1 *Sid.* 11. *Per two J. Dy.* 370. a. *in margin.*

Yet, by the *st.* 27 *El.* 13. no hundred shall be chargeable, if any of the robbers be taken.

If any be taken before the action commenced, tho' he be taken after the forty days after the robbery. *Co. Ent.* 348, 349.

The pleading is *hucusque non ceperunt.* *Semb.* 1 *Sid.* 11.

So, if any be taken, tho' he be not taken upon the hue and cry, but in any other part of the county. *Per Hale*, 1 *Vent.* 119.

If the robber be charged with the robbery in the presence of a justice of peace, it shall be a taking, altho' no one lays his hand upon him. *R.* 1 *Vent.* 118. 235. 2 *Keb.* 760. 2 *Lev.* 4.

So, if he be found in gaol for another offence, and is indicted for that robbery.

But a taking upon suspicion, if he be acquitted, is not sufficient. *Per Periam*, *Dy.* 370. a. *in marg.*

So, by the *st.* 27 *El.* 13. no hundred shall be charged, unless the party make oath within twenty days before the action brought, that he

knows not the robbers, or any of them, before some justice of peace of the hundred, or near it.

If the action be discontinued, and a new one commenced, there ought to be such oath within twenty days before the new action. *R. 1 Sid. 139. 1 Keb. 495.*

And an oath, *that he does not know the robbers*, is not sufficient, without saying "*or any of them.*" *Semb. Noy, 21.*

The party robbed must make the oath.

If the action be by the master, where his servant was robbed, the servant must swear, and not the master. *R. Cro. El. 142. 1 Leo. 323. R. Cro. Car. 38. 336. Adm. 3 Mod. 288. Sal. 613.*

If the master brings the action upon a robbery of two servants, both must make oath. *3 Mod. 288. R. inter Asbcomb and Hundred of Eltham, B. R. 2 W. & M. Sho. 94. 241.*

If the servant delivers part of the money to another who travels with him, and they are both robbed together, both must make oath. *R. inter Asbcomb and Hundred of Eltham, 3 Mod. 288.*

Tho' one be a quaker, and refuse the oath. *3 Mod. 288. Sal. 613.*

But if the master brings an action upon the robbery of two servants, and one only swears, he shall recover for so much as was in his possession. *3 Mod. 289. Sal. 613. Carth. 146.*

If the master delivers part of his money to his servant, and they are robbed together, and the master brings the action, it is sufficient if the master alone swears; for the money delivered to the servant remains in the possession of the master, if he be robbed in the presence of the master. *R. inter Jones and Hundred of Rumley, 1658, 3 Mod. 288. Sal. 613. Carth. 146.*

So, if the servant delivers part of the money to *A.* and they are robbed together, and afterwards the servant brings an action for the whole; it is sufficient if the servant alone makes oath; for the whole was in his possession. *Carth. 146.*

And if the servant be robbed of money in the presence of the master, and the master alone swears, and brings an action, it is sufficient, tho' the servant knows some of the robbers, and informs his master of it. *R. 3 Mod. 288. Carth. 146.*

So, an action lies, tho' the party after the oath detect the robbers. *R. Mar. pl. 28.*

So, if the oath be taken by a justice of peace out of the county, it is sufficient; for it is a ministerial act. *R. Jon. 239. Cro. Car. 211.*

If a justice of peace refuses an examination, an action upon the cases lies against him; for he is only ministerial. *Semb. 1 Leo. 323.*

If the oath be taken by a justice of peace within the county, altho' it be not within the hundred, it is sufficient. *R. Sal. 614.*

So, by the *st. 8 Geo. 2. 16.* no action shall be brought unless before commencement the party before the chief clerk, or secondary, or filazer of the county, or clerk of the pleas of the court, where the action is brought, or sheriff of the county, give bond of 100*l.* penalty with two sureties to the high constable of the hundred, with condition to pay costs if the plaintiff be nonsuit, discontinue, have a verdict, or judgment on demurrer against him.

Which bond shall be certified by such chief clerk, &c. to the chief clerk or secondary in *B. R.* or filazer of the county in *C. B.* or to the clerk of the pleas or his deputy in the *Exchequer*, before process shall issue in such suit.

None shall take for such bond more than 5 *s.* besides stamp-duties, nor more than 2 *s.* 6 *d.* for making such certificate, and 2 *s.* 6 *d.* for filing it; and the chief clerk, &c. upon request shall deliver it over to the high constable *gratis*.

So, tho' it lies since the *ft. of Winton*, tho' the robbery was on a Sunday. *R. 1 Brownl. 156. Per three J. Mont. cont. 2 Rol. 59. 2 Cro. 469.*

Yet, by the *ft. 29 Car. 2. 7.* if any, who shall travel on the Lord's day, shall be then robbed, no hundred shall be answerable for it, but the person shall be barred from bringing any action for the said robbery.

But if a man be robbed in going in his coach to church he shall have an action against the hundred; for that is not travelling within the intent of the *ft. 29 Car. 2. R. in C. B. (7 Geo. inter Taskmaker and Hundred of Edmonton. Com. 345.)*

[By *stat. 22 Geo. 2. c. 24.* none shall recover above 200 *l.* unless there were two persons together at the robbery, to attest the truth of it.]

As to the proceeding, declaration, plea, &c. in an action upon the *ft. of Winton*, *vide in Pleader*, (2 S 1, &c.)

(C 5.) *How the charge upon the hundred shall be levied.*] If there be judgment against the hundred, it may be levied against the inhabitants of the same hundred by *fieri facias*.

So, it may be levied upon any one, who has lands in his possession within the hundred, tho' he has no house, nor lodging there; for he is an inhabitant. *R. 2 Saund. 423.*

Upon a lessee, or purchaser after the robbery committed. *R. Noy, 155.*

So, it may be levied upon one or two of the inhabitants.

But if a man come to inhabit in an hundred after a robbery done, he shall not be charged. *R. Hut. 125. Cont. per Barckley, Mar. pl. 28.*

So, if the whole debt be levied upon one or two of the hundred, by the *ft. 27 El. 13.* on complaint to two justices of peace of the county (*quorum unus*) in or near the hundred, they may assess rateably all the towns, &c. within the same hundred, or in the liberties within the same, for the relief of him against whom the plaintiff took execution; and the constable of each town, &c. may rateably assess the said sum on every inhabitant, and, if he refuse to pay, levy it by distress and sale, &c.

And by the *same statute*, the hundred, where default of fresh suit on hue and cry was made, shall answer half the damages recovered against the hundred, in which the robbery was committed, to be recovered by debt, &c. at the suit of the clerk of the peace.

By the *ft. 8 G. 2. 16.* after judgment against the hundred, no process shall be served on the high constable or any inhabitant, but the sheriff on receipt of the writ of execution shall shew it *gratis* to two justices of the peace in or near the hundred, who shall speedily cause



an assessment to be levied pursuant to the *stat. 27 Eliz. 13.* and also for the necessary expences of the high constable above the costs and damages recovered, of which no notice from the two justices, he shall give an account and proof on oath to their satisfaction, having first caused his attorney's bill to be taxed.

The sheriff shall pay the money levied to the parties without fee, and indorse the day of receiving the writ of execution, and not to be called upon for a return till sixty days after.

And the like assessment shall be in case the plaintiff be nonsuit, discontinued, or have a verdict or judgment on demurrer against him, if by insolvency of the plaintiff or his sureties, he cannot be reimbursed on the bond of 100*l.* penalty; and the money levied shall be paid to the justices for the high constable in ten days after it is levied.

And the justices may limit a time not exceeding thirty days for levying such assessment; and the officer appointed refusing or neglecting to levy and pay the money, &c. in such time forfeits double the sum.

[By *stat. 22 G. 2. c. 46.* the *stat. 8 G. c. 16.* relating to execution on hue and cry, is extended to all executions against the inhabitants of a hundred.]

[As to actions against the hundred to make good damages done by offenders in pulling down, &c. any church, &c. *vide stat. 1 G. 1. stat. 2. c. 5. f. 6.*]

[If persons riotously assembled demolish the doors and windows of a house, and having thus riotously obtained an entrance into the house, destroy the goods and furniture in it, the hundred are liable under this statute for the damage done to the furniture as well as to the house. *Ratcliffe v. Eden, B. R. M. 17 Geo. 3. Cowp. 485.*]

[It is not necessary, in an action upon this statute, for the riotous demolition of an house, to prove that twelve rioters were assembled at the time. *Pritchitt v. Waldron, B. R. M. 33 Geo. 3. 5 T. R. 14.*]

[A trustee of a satisfied term may maintain this action. *Ibid.*]

[An order of justices for the levying of money upon the inhabitants of an hundred under the riot act, directing that the money when levied should be paid into the hands of a banker subject to their further order, is bad. *Rex v. Halfshire, T. 33 Geo. 3. 5 T. R. 341.*]

[A writ of execution sued out by the party who has recovered damages against the hundred, and delivered by the sheriff to the justices, appears to be a good foundation for an order to levy the amount. *Ibid.*]

[An order for levying the damages ought to be upon the inhabitants of the towns, parishes, villages, and hamlets; pursuant to the words of the *stat. 27 Eliz. c. 13.* and not upon the inhabitants of the districts and parishes within the hundred. *Ibid.*]

[The hundred are not liable in an action for damages brought by the person injured by a mob beginning to pull down his house, &c. unless the riot be of such a kind as to amount to felony within the statute. *Reid v. Clarke, B. R. H. 38 Geo. 3. 7 T. R. 496.*]

[For maiming cattle, destroying trees, setting fire to any house, &c. *vide 9 Geo. 1. c. 22. f. 7. & 29 Geo. 2. c. 36. f. 9.*]

[For destroying turnpike-gates, flood-gates, &c. *vide 8 Geo. 2. c. 20. f. 6.*]

[For cutting down banks of the sea, of a river, or hop binds, *vide 10 G. 2. c. 32. f. 4.*]

[For

[For destroying corn to hinder the exportation, *vide* 11 G. 2. c. 22. s. 5.]

[For wounding, maiming, &c. officers of the revenue, in seizing wool, prohibited or uncustomed goods, *vide* 19 Geo. 2. c. 34. s. 6.]

[*Vide* the st. 30 Geo. 2. 3. s. 116. that no receiver general of the land tax, or his agents, can sue the hundred for a robbery, unless the persons carrying the money be three in company.]

## HUNTING.

*Vide Chase*, (H 1, &c.)—*Justices*, (S 7.)—*Justices of the Peace*, (B 47. 49.)

## HUSBAND AND WIFE.

*Vide Baron and Feme*.—*Chancery*, (2 M 1, &c.)

## HUSTINGS.

*Vide Courts*, (O 1.)

## IDEMPTITATE NOMINIS.

## (A) When it lies.

**T**HE writ of *idemptitate nominis* lies, when a man is taken or molested by process against another of the same name. *F. N. B.* 268.

And it shall be directed to the escheator, or to the sheriff, if a man or his goods are taken by process against another directed to them. *F. N. B.* 268.

If he be taken by process against an accomptant out of the *Exchequer*, it shall be directed to the treasurer and barons of the *Exchequer*. *F. N. B.* 268. A.

If by process after outlawry in *B. R.* or *C. B.* it shall be directed to the justices of the same court. *F. N. B.* 268. B.

So, it shall be directed to the justices of gaol-delivery, or of the peace, if he be molested by process upon indictment before them. *F. N. B.* 268. C.

So, it lies after judgment and execution sued. *R.* 2 Cro. 623. *Semb. cont. Hob.* 330.

This writ directed to the justices seems to be only a commission to them to make inquiry of the truth, upon which they award a writ of inquiry to the sheriff. *F. N. B.* 268. B.

And thereupon, the attorney-general may plead, *quod est eadem persona*; which shall be tried by a jury, and judgment according to the verdict. *Hob.* 330.

But a man taken by a *capias utlagatum* may come into *C. B.* and pray a writ of inquiry whether he be the same person, without suing an *idemptitate nominis*. *F. N. B.* 268. B.

So, upon an exigent a man of the same name may offer himself to answer; and if the plaintiff says, that he is not the same person, he shall put the difference of the names, and according to such difference, the exigent shall be awarded. *F. N. B. 268. B.*

But where a man appears by *superfedeas* upon an exigent returned outlawed, the plaintiff cannot say, that he is not the same person, and so defeat the outlawry; without a writ of *idemtitate nominis*. *F. N. B. 268. B.*

So, upon an exigent on an indictment a man cannot say, that he is of the same name, and pray that the attorney-general may put a difference of names, for it would be changing the indictment; but the party if he be aggrieved must have an *idemtitate nominis*. *F. N. B. 268. C.*

## I D I O T.

## (A) Idiot; Who shall be.

**P**ERSONS who are *non compotes mentis* are ideots, or of non-sane memory.

Idiots are *fatui naturales*, which were of non-sane memory à *natiuitate*. *Co. L. 247. a. Staundford's Præ. R. 34. b.*

And it is sufficient to find him so, if he has not any use of reason: as, if he cannot count 20d. *F. N. B. 233. B.*

Has no understanding to tell his age; who is his father or mother, &c. *F. N. B. 233. B.*

What will be for his profit or loss. *F. N. B. 233. B.*

But a man shall not be called an idiot, if he has the understanding to learn, or know letters. *F. N. B. 233. B.*

To read by the instruction, or information, of another. *F. N. B. 233. B.*

## (B) Lunatick, &amp;c.

**S**O, if any person be by sickness or other accident deprived of the use of his reason, he shall be esteemed *non compas mentis*. *Co. L. 247. a.*

Tho' he be a lunatick, and have lucid intervals. *Co. L. 247. a.*

[If a man loses his speech by an apoplectic fit, tho' he shews some signs of sense, a commission may be granted against him. *Pitt's Case, T. 7. Geo. 2. B. R. H. 52.*]

## (C) The King shall have the Custody of them.

What Interest the King has.

**T**HE king, of right, has the protection and defence of all his subjects, their lands, and goods. *R. N. B. 232. A.*

And therefore by the *st. Prærog. Reg. 17 Ed. 2. 9. rex habebit custodiam terrarum fatuorum naturalium, capiendo exitus earum sine vasso, & inueniet eis necessaria, de cuiuscunque feodo, & post mortem eorum reddit haredibus, ita quod nullatenus per eisdem fatuos alienentur, &c.*

And



And by the same *st.* 17 *Ed.* 2. 10. *rex providebit, si quis, qui prius habuit intellectum, fuerit non compos mentis, ut quidam sunt per lucida intervalla, quod terra custodiantur sine vasso, & ipse & familia inde sustentantur competenter, & residuum custodiatur ad opus ipsorum, ita quod prædicta terra infra prædictum tempus nullatenus alienentur, nec rex aliquid de exitibus recipiat ad opus suum.*

[This stat. is not introductive of any new right in the crown. *Oxenden v. Compton, 2 Ves. jun. 71.*]

[The words thereof, "waste, and destruction," used in the ordinary, not the technical sense. *Ibid.*]

[Under this stat. the crown commits the care of lunaticks to some great officer, not of necessity the chancellor. The warrant confers no jurisdiction, but only a power of administration. The appeal is to the king in council. *Ibid.*]

This prerogative seems to have commenced *tempore Ed. 1. St. Præ. R. 33. b.*

And therefore, the king himself shall have the custody of an idiot, his lands and goods. *4 Co. 126.*

And shall have them during the life of the idiot. *St. Præ. R. 34. a. 4 Co. 126. a. Dy. 26. in marg.*

The king may take the profits of an idiot's estate to his use, allowing necessities to him and his family. *St. Præ. R. 35. a. Mo. 4 Dy. 26. a.*

So, he may demise his lands, rendering rent. *St. Præ. 35. a.*

So, the king may grant the custody of an idiot, his lands, and goods to another. *2 Ca. Ch. 70. 1 And. 23.*

So, he may grant them to another, without security to account. *3 Mod. 43.*

And such grant extends to the executor or administrator of the grantee. *3 Mod. 44. Skin. 139. 177.*

So, he may commit the care of a *non compos* to another, so that his family be maintained, and nothing wasted. *4 Co. 127. b.*

But the king is not seised of the lands of an idiot; for he remains seised of the freehold. *4 Co. 126. a. St. Præ. R. 35. b.*

So, the king out of the profits must allow necessities for him and his family. *St. Præ. R. 35. a.*

Must make reparations. *St. Præ. R. 35. a.*

So, a grant of the custody to another and his executors, will not be good to the executor. *Qu. 2 Ca. Ch. 70. 1 Ver. 9. 137. Skin. 4.*

So, the king shall not have a copyhold, which belongs to an idiot. *4 Co. 26. b.*

Nor, a right, or title of entry, or action. *St. Præ. R. 35. b.*

So, after the death of an idiot, the king upon an *ouster-le-mains* shall restore the land to the heir. *St. Præ. R. 35. a.*

So, the king has no interest in the person of a lunatick, &c. as of an idiot. *4 Co. 127. a.*

Nor, can he grant the custody of him and his lands, to the use of the grantee. *4 Co. 127. b. R. Mo. 4. 1 And. 23. Bend. 17. Dy. 25. b.*

Or, without security to account to him, if he becomes *compos*; otherwise, to his executor or administrator. *3 Mod. 43. Qu. Dy. 26. a.*

[The king's grant of a lunatick's estate, without account, is void; but the king, or lord-chancellor, by authority of the sign manual, may

may allow such a yearly maintenance to the committee, as amounts to the yearly value of the lunatick's estate. *Sheldon v. Fortescue A.*, P. 1731, 3 P. W. 104.]

[If custody of lunatick is granted to husband and wife, (she being next of kin,) it determines on her death. *Ex parte Lyne*, M. 9 Geo. 2. C. T. T. 143.]

Yet, he shall present to a church for a lunatick. *Win. Ent.* 629. (663.)

How a commission for an idiot, lunatick, &c. shall be granted, *vide in Chancery* (3 Q).

If the king be informed, that such a one is an idiot, or non-sane, he may bring him before his chancellor to be examined, and afterwards an inquisition may be awarded to inquire, whether he be an idiot, non-sane, &c. *St. Pra. Reg.* 34.

Before the chancellor, or any other whom the king shall appoint, *St. Pra. Reg.* 34. b.

So, the king may award a writ to the escheator or sheriff, *quod in propria persona ad ipsum accedat & ipsum viis & modis, &c. examinet, & nihilominus per sacramentum, &c. inquiret si idiota sit, necne; & si sit, utrum à nativitate, aut ab alio & quo tempore, & si lucidis gaudeat intervallis, &c.* *F. N. B.* 233.

And if he be found an idiot by office, and die; the king may afterwards seize his lands; for he must restore them to his heir. *St. Pra. R.* 35. b.

So, if he be found an idiot for 8 years, these words, 8 years, shall be rejected, for finding, that he is an idiot, generally, is sufficient, and the addition will be superfluous. *R.* 3 Mod. 43.

If he be found an idiot and that he aliened, without saying, how, or for what estate, it is sufficient to give the custody of him and all his lands to the king. *R. Ley.* 25.

But before office the king cannot seize the lands of an idiot, or non-sane person. 4 Co. 127. a.

And no office can be found after his death. 4 Co. 127. a.

So, a man, who takes upon him the care of a lunatick, &c. of his own head, shall be accountable as bailiff to him, his executors, or administrators. 4 Co. 127. b. *Vide Account*, (A 3.)

[The committee of a lunatick cannot make a lease of the lunatick's lands by law. *Knipe v. Palmer*, T. 33 & 34 Geo. 2. 2 Wils. 130.]

And if he invests the personal estate of the lunatick in the purchase of land, it shall be distributed as personal estate, and not go to the heir. *R.* 2 Ver. 192.

But if a man be found an idiot, &c. or non-sane, by inquisition and examination before the escheator, or sheriff, he may in person, or by his friends, come before the chancellor and king's counsel, and pray to be examined there. *F. N. B.* 233. *St. Pra. R.* 36. a.

And he may have a writ to bring him before the king's counsel. *F. N. B.* 233. *St. Pra. R.* 36. a.

And if he be found no idiot, the first inquisition before the sheriff, &c. tho' it be returned, shall be void, without a traverse. *F. N. B.* 233; *St. Pra. R.* 36. a.

[By stat. 17 Geo. 2. c. 5. ff. 20 & 21. two justices may order a lunatick to be confined in any place in the county, if his settlement is in the county, if not, to send him to his settlement; the expences to be

be raised by warrant of two justices, by sale of his goods, or rents of his lands; and if he has not an estate to pay it, above what is sufficient to maintain his family, then by his parish: but this is not to abridge the king, chancellor, &c. nor the friends or relations.]

[By *stat. 14 Geo. 3. c. 49.* mad-houses are regulated. None may keep more than one lunatick (except committed by chancellor) on pain of 500*l.* without annual licence from commissioners appointed by college of physicians, for seven miles round *London*, and by quarter sessions elsewhere.]

[No person to keep two houses; commissioners to visit houses once a year, or when required by chancellor or either chief justice, or when they think fit, and examine persons confined. Commissioner may, on application, inform a person applying of the name of a person confined, and where, and by whom. Keeper receiving a patient without order from physician, surgeon or apothecary, or not sending notice to the secretary of the commissioners, in three days near *London*, or fourteen days elsewhere, forfeits 100*l.* This act gives no new justification, but all must be justified at common law.]

### (D) Acts by a *Non-compos.*

(D 1.) What are void.

ALL acts, which an idiot, or *non-compos*, can do, concern his life, his lands, or his goods. 4 *Co.* 124. a.

By the civil law, all acts of a *non-compos* are void, without the assent of his tutor. 4 *Co.* 125. b.

By the common law, every disposition by will by a *non-compos* is void. *Vide Devise*, (H 1.)

So, a deed by a *non-compos* is void. *Ca. Parl.* 154.

As, if a *non-compos* execute a surrender of his estate for life, it will be void. *R. Ca. Parl.* 153. *R. in B. R. and afterwards affirmed in Parliament.* 3 *Mod.* 310. *Sal.* 427. *Comb.* 438, 468.

So, a grant of a rent-charge by a *non-compos* will be void. *Ca. Parl.* 153.

So, if a *non-compos* make a feoffment by letter of attorney, it will be void, as to all except himself. 4 *Co.* 125. a.

Altho' it be reasonable, and for the benefit of his family. 2 *Ver.* 414.

[By *stat. 15 Geo. 2. c. 30.* if lunatick under a commission, or whose person and estate by act of parliament is committed to the care of trustees, shall marry before declared of sane mind by the lord chancellor, &c. or such trustees respectively, such marriage is void to all intents. This act was supposed, at the time, to be made on occasion of Mr. *Newport*, natural son to the late earl of *Bradford*, who had left him a very great fortune, with remainder to another person.]

(D 2.) What only voidable.

But a feoffment by a *non-compos* in person is only voidable. 4 *Co.* 125. a.

(D 3.) What he may do, if he becomes sane.

If a lunatick becomes of sane memory, he may afterwards make a feoffment, &c.

But



But if found a lunatick by commission; the *Chancery* will direct, that in order to make a settlement he shall levy a fine in *C. B.* and it shall be tried upon issue there, whether he be *compos.* 1 *Ver.* 155.

*Vide Chancery* (3 Q.).

(D 4.) How avoided.

(D 4.) *By the king upon office.*] If an idiot make a feoffment or other conveyance of his lands and tenements, after office found, the king shall avoid them. *St. Præ. R.* 34. b. 35. b. 4 *Co.* 127. a.

So, if a lunatick, or other *non-compos*, make a feoffment, &c. upon office found it shall be avoided. 4 *Co.* 127. a. 1 *Ca. Ch.* 113.

And upon office it shall be avoided, as to the idiot or *non-compos* himself. *Co. L.* 247. a.

For after office upon a *scire facias* against the alienee, the land shall be seized into the king's hands. 4 *Co.* 126. b.

And by such seizure the freehold is reverted in the *non-compos*. 4 *Co.* 126. b.

Or, it may be avoided upon an information by the attorney-general, as well as by *scire facias*. 1 *Ca. Ch.* 113. 153.

So, by office, his grant of a copyhold shall be avoided, tho' it cannot be seized by the king. 4 *Co.* 126. b.

So, after office, all gifts by him of his goods are avoided. 4 *Co.* 126. b.

And all bonds. 4 *Co.* 126. b.

Or, other deeds. 4 *Co.* 126. b.

And if he be afterwards sued upon such a bond or deed, so long as the office is in force, a *superfedeas* reciting the office may be sent to the justices. 4 *Co.* 126. b.

An office found as to an idiot relates to his nativity, and avoids all acts from that time. 4 *Co.* 126. b.

As to a lunatick, &c. it relates to the time when he is found to be *non-compos*. 1 *Ca. Ch.* 113.

Yet, where the office has a retrospect, a purchaser shall be allowed to traverse. *R.* 1 *Ca. Ch.* 113.

(D 5.) *By the heir.*] So, if there be an alienation by a *non-compos* in fee, in tail, for life, or years, his heir may avoid it by entry, if his entry be congeable. *F. N. B.* 202. F.

Or, if it be not congeable, by a writ of *dum non fuit compos mentis*. *F. N. B.* 202. F. *Vide dum fuit infra etatem.* (B).

The process in a *dum non fuit compos mentis* is the same as in a *præcipe quod reddat*; viz. summons grand cape, and petit cape. *F. N. B.* 203. D.

So, the heir may avoid the alienation of his ancestor being *non compos*, by plea, as well as by entry, and writ of *dum non fuit compos*. *Co. L.* 247. b.

(D 6.) When they shall not be avoided.

But an idiot, or person non-sane, cannot himself have a *dum non fuit compos*; for he cannot stultify himself. *Cent. F. N. B.* 202. C. D. *R. acc.* 4 *Co.* 123. b. *Semb. cont. Ca. Parl.* 153.

And therefore, a feoffment, release, or grant, cannot be avoided by a *non-compos* himself; for he cannot by plea disable himself. *R.* 4 *Co.* 123. b. *Co. L.* 247. a. b. Tho'

Tho' the feoffment was by attorney. 4 Co. 125. a.

So, to a bond by himself, he cannot plead, *quod non fuit compos*. R. 4 Co. 123. b. R. Cro. El. 398.

So, a *non-compos* shall not be aided by a court of equity, against an alienation which he himself cannot avoid by law. R. 4 Co. 124. a.

So, a feoffment, &c. by a *non-compos* shall never be avoided by a privy in estate, or tenure: and therefore, if a *non-compos* make a feoffment, and die without heir, the lord by escheat shall not avoid it. 4 Co. 124. a.

So, if a donee in tail make a feoffment, and die without issue, it shall not be avoided by him in reversion, or remainder. 4 Co. 124. a.

So, by the st. 4 Geo. 2. 10. idiot, lunatick, or *non-compos*, being a trustee or mortgagee may, or his committee in his name by direction of lord chancellor, &c. on petition may convey lands, &c. as directed.

So, if a *non-compos* alien by matter of record, it shall never be avoided by him or his heirs: as, if he levy a fine, or suffer a recovery. 4 Co. 124. a. Co. L. 247. a.

So, every act, which he does in a court of record, binds him and all other persons for ever. 4 Co. 124. a.

As, a judgment, statute, recognizance, &c. 4 Co. 124. a. 125. a.

(D 7.) What Acts he may do.

So, a *non-compos* may maintain, or defend an action. Poph. 141.

If an idiot sue, he must appear in person, and any one who prays to be admitted as his friend may sue for him. Semb. 2 Saund. 335.

So, if an action be against an idiot, he must appear in his proper person, and any one who can make a better defence shall be admitted to defend for him. St. Pra. R. 36. 4 Co. 124. b.

But another *non-compos* must appear by guardian, if he be within age, and by attorney, if he be of full age. 4 Co. 124. b.

And if an action be by the committee of a lunatick and not by himself, it will be bad. R. 1 Brownl. 197. Poph. 141.

So, a *non-compos* shall not be punished for murder, or felony. 4 Co. 124.

But a *non-compos* shall be punished for high treason. 4 Co. 124. b.

So, the laches of a *non-compos* prejudices him as to a title of entry: as, if a *non-compos* be disseised, and the disseisor die seised, &c. the descent tolls his entry. 4 Co. 125. b.

But laches in a *non-compos* does not bar him of his right: as, if the disseisor levy a fine, non-claim for a year and a day at the common law does not bar him. 4 Co. 125.

So, the heir shall not be barred of his entry by the laches of a *non-compos*, tho' he himself be. 4 Co. 125. b.

[By the st. 4 Geo. 2. c. 20. idiots, lunaticks, &c. or their committees, by direction of the lord chancellor, may assign trusts and mortgages; and be ordered to make such conveyances, in like manner as trustees and mortgagees of sane mind.]

Vide Capacity, (D 5.)—[Chancery, (32.)]

JEOFAILE.

Vide Amendment, per Totum.—Pleader, (E 39.)

## JERSEY, Isle of.

*Vide Navigation*, (F 3.)

## JETSAN.

*Vide Wreck* (A).

## IMPARLANCE.

*Vide Abatement*, (I 19, 20.)—*Information*, (D 5.)—*Pleader*, (D 1, &c.)

## IMPEACHMENT.

*Vide Parliament*, (L 18, &c.)

## IMPLICATION.

*Vide Devise*, (N 12, 13.)

## IMPORTATION.

*Vide Trade*, (A 4.—C 2.)

## IMPOSITIONS.

*Vide Prerogative*, (D 48.)

## IMPRESSION.

*Vide Money*, (B 3.)

## IMPRISONMENT.

## (A) What shall be a Prison.

**A**LL prisons are the king's prisons. 2 *Inst.* 100. 589.And a subject shall not have a prison of his own. 2 *Inst.* 100.By the *st.* *Mert.* 20 *H.* 3. 11. *magnates petierunt propriam prisonam de illis quos caperent in parcis & vivariis suis quod rex contradixit.* 2 *Inst.* 100.And therefore, where the lord of a franchise has the custody of a prison, it is the king's prison. 2 *Inst.* 589.And none can claim the custody of a prison as a franchise unless he has also gaol-delivery. 1 *Sal.* 343.A prison cannot be newly erected, except by act of parliament. 2 *Inst.* 705.By the *st.* 23 *H.* 8. 2. justices of peace in *Essex*, &c. may within a year erect a new gaol in their county and assess for it, &c.And by the *st.* 5 *Eliz.* 24. they may do it within ten years afterwards.And by the *st.* 13 *El.* 25. within ten years after the former ten years.

But



But the *st.* 11 & 12 *W.* 3. 19. justices upon presentment of grand jury at assizes may build or repair gaols in their county as the quarter sessions think fit, and assess in equal proportion, &c. for ten years. Which was continued by the *st.* 10 *Ann.* 14. for seven years; and by the *st.* 6 *Geo.* 19. made perpetual.

### (B) Common Gaol.

**A** Commitment upon a conviction before justices of *oyer and terminer* to the gaol, without saying, to the *sheriff*, is bad. *R.* 1 *Sal.* 348.

So, a commitment by a court in *London* ought regularly to be to the sheriff. *R.* 1 *Sal.* 349.

But a commitment by another till he be carried to the gaol, is well; as, a commitment to a messenger by the secretary; for it shall be intended to be for such purpose. *R.* 1 *Sal.* 347.

So, if a commitment be not to the common gaol, the warrant is not therefore void. 1 *Sal.* 347.

And by the *st.* 6 *Geo.* 19. justices of peace may commit vagrants and criminals for small offences to the common gaol, or house of correction.

### (C) Marshalsea Prison.

**T**HE prison of the Marshalsea shall be within such limits as *B. R.* by rule appoints. 1 *Rel.* 810. *l.* 50.

And *B. R.* by rule may appoint it in any place in *England*. *R.* 1 *Rel.* 810. *l.* 50. *Cro. Car.* 210. 466.

By the *st.* 19 *H.* 7. 10. the sheriff of *Surry*, or any other sheriff, shall not have the custody of the gaols of King's Bench, or Marshalsea, or either of them, but the patentees of the crown.

But the marshal cannot for any necessity, as by reason of a plague, &c. keep his prisoners in any but the antient place, without a rule of court. 1 *Rel.* 810. *l.* 45. *Cro. Car.* 466.

And if a new place be appointed by the court, he must keep them there safely. 1 *Rel.* 810. *l.* 50.

[The court will not enlarge the rules while the prison is repairing, till the proprietors undertake by rule to repair it. *N. B.* They are obliged to repair, on pain of forfeiture. *Case of King's Bench Prison*, *H.* 12 *Geo.* *Str.* 678.]

[The court will not grant the benefit of the rules to any one in execution for an offence, even on affidavit of sickness. *Rex v. Kinnerley*, *T.* 5 *G.* *Str.* 193. *Capt. Haye's Case*, *T.* 3 *G.* 2. *Str.* 817. 843.]

[A prisoner for a contempt cannot have the benefit of the rules, *Landen Jones's Case*, *M.* 2 *Geo.* 2. *Str.* 817.]

A lease of the office of marshal to *A.* for years, if he so long live, will be good. *Mod. C.* 57. [By the *st.* 8 & 9 *W.* 3. 26. it is sufficient to detain prisoners in the prison of the King's Bench, or rules of the same.

[By *stat.* 27 *G.* 2. *c.* 17. the power of appointing the marshal (which office had been granted in fee by *James* 1st) is revested in the king, (satisfaction being made for a debt secured thereon,) and various regulations made relating to the officers and prison.]

[It doth not appear the high-bar money (money paid into the box of the court of *B. R.* on motions and affidavits made in court) was  
eve

ever paid to the prisoners on the common side; but is paid by the secondary into the hands of the clerk of the junior judge of *B. R.* to be paid over in equal shares to the judges of *B. R.* to be disposed of for such charitable purposes as they think proper. *Prisoners' Case, T. 32 & 33 G. 2. 2 B. M. 867.*]

## (D) Fleet.

**T**HE prison of the Fleet is proper for the *Chancery, C. B.* and *Exchequer. Vide Chancery, (B 8.)*

The limits of the prison are the walls; for houses within the liberty of the Fleet are no part of the prison. *R. 2 Mod. 221.*

But by the *st. 8 & 9 W. 3. 26.* it is sufficient to detain prisoners in the Fleet, or rules of the same.

But the warden by licence of *C. B.* may keep his prisoners in any other place assigned by the court. *Cro. Car. 466.*

So, *B. R.* may charge a prisoner, in execution there for the king's debt, with execution upon a judgment against him for the debt of a subject. *Dub. Dy. 297.*

## (E) Newgate.

**B**y charter 1 *H. 4.* the citizens of *London* shall have the custody of Newgate.

But the court cannot take notice, that the keeper of Newgate is an officer of *London.* *R. 1 Sal. 349.*

## (F) Gaoler; Who shall be.

**T**HE king may make a subject keeper of a prison. *2 Inst. 100.*

And therefore, where the king grants to a corporation a gaol within their precinct, the mayor, &c. is gaoler.

So, the sheriff has the custody of the county gaol.

And cannot farm his gaol.

So, if he gives the gaol to a servant, who sells it, and gives the money to the sheriff. *R. 1 Mo. 781.*

By the *st. 14 Ed. 3. 10.* all gaols shall be rejoined to the bailiwick of the sheriff, who shall have the custody of the same; and put in such keepers for whom he will answer.

And by the *st. 19 H. 7. 10.* the sheriff shall have custody of all common gaols, prisons, and prisoners in his county, except such of which any person spiritual, or temporal, or corporation hath the inheritance; and all patents for future grants of the same for life, or years, shall be void.

[By 24 *Geo. 2. c. 40.* no spirituous liquors shall be used in a gaol, on pain of 100*l.* by gaoler, and for second offence forfeiture of office.]

[A gaoler is bound to receive a prisoner tendred to him, after the return day of the writ on which he was arrested. *1 T. R. 60.*]

## (G) Imprisonment; What shall be.

**E**VERY restraint of the liberty of a free man will be an imprisonment. *2 Inst. 482. Cro. Car. 210.*

Tho'

Tho' it be in the high-street or elsewhere, and he be not put into any prison, or house. *Per Thorpe, Fitzh. Bar. 301.*

### (H) What is a Cause for Imprisonment.

#### (H 1.) Lawful Procefs.

(H 1.) *Procefs founded upon a record.* **A** Man may be imprisoned upon any lawful procefs.

As, upon a procefs founded upon matter of record: as, upon an indictment, or presentment.

Or, upon a plaint, or original filed, or judgment given.

(H 2.) *Founded upon a suggestion.* So, a man may be imprisoned upon the king's writ founded upon a suggestion; for that is a lawful procefs. *2 Inst. 53.*

As, upon a writ to the sheriff *ad capiendum impugnatores juris regni & eos ducendum ad gaolam.* *2 Inst. 53. Reg. 64.*

Or, a writ to take up a soldier who has received his prest-money *ad proficiscendum in obsequium regis.* *2 Inst. 53. Reg. 24. 191.*

Or, a writ *de apostata capiendo* against a man professed, who departs from his abbey. *2 Inst. 53, 54.*

So, upon a writ *de leproso amovendo, ne exeat regnum.* *2 Inst. 54. Vide Leprosy.*

So, upon a writ *de vi laica amovenda.* *2 Inst. 54.*

(H 3.) *Procefs out of a lawful court.* So, upon a procefs out of any court allowed by law, tho' it does not proceed according to the common law; for their law allowed in this realm is part of the law of England. *2 Inst. 51.*

As, procefs out of the Admiralty, according to the marine law, for an offence upon the high sea. *2 Inst. 51.*

Or, procefs out of the court of the constable and marshal, according to the civil law. *2 Inst. 51.*

#### (H 4.) Authority of Law.

(H 4.) *What shall be sufficient.* So, a man may be imprisoned by warrant of law, for that is a lawful procefs: as, by a constable *ex officio*, who upon complaint of a felony may commit the offender to an house, gaol, or stocks, till he can be brought before a justice of peace. *H. P. C. 92. Vide Leet (K).*

By any in aid of an officer, who has a lawful authority. *2 Rol. 561. l. 5. 15. H. P. C. 90.*

By a sheriff for an insult upon him in the street. *R. 2 Bul. 330.*

By the watch, if the person be a night-walker. *2 Inst. 52.*

So, if a felony be committed, the offender may be apprehended by any private person. *H. P. C. 89.*

So, if a grievous wound be given, tho' death does not follow. *2 Inst. 52. H. P. C. 90.*

Or, if hue and cry be levied against him. *2 Inst. 52. 2 Rol. 559. l. 20. H. P. C. 90, 91.*

So, if treason or felony be committed, a person probably suspected may be apprehended, tho' he be not guilty. *2 Inst. 52. H. P. C. 91.*



As, a person in company with felons. 2 *Inst.* 52. *H. P. C.* 91.

Or, who has the goods in his custody. *H. P. C.* 91.

Or, flies; or absconds. 2 *Inst.* 52. *H. P. C.* 92, 93.

Or, is accused by common fame. 2 *Inst.* 52. *H. P. C.* 91.

Or, is a vagrant. *H. P. C.* 21.

And upon such suspicion, a man may enter an house if the door be open. *H. P. C.* 91.

But he cannot break open the door. *H. P. C.* 91.

So, a man may apprehend another for prevention of an apparent mischief; as, to restrain a madman, combatant. 2 *Rel.* 559. *E.*

So, he may seize his villein, ward, &c.

The youngest brother, where the eldest is out of the realm, and suspected not to be alive. 2 *Rel.* 560. *l.* 10.

(H 5.) *What not.*] But the law gives no authority to apprehend any one upon the command of the king, tho' it be in the king's presence. 2 *Inst.* 186, 7.

Or, upon a commission under the great seal, tho' he be a felon, &c. 2 *Inst.* 54.

Or, by force of a bye-law. 2 *Inst.* 54. 5 *Co.* 64. *Vide Bye-Law*, (E 1.)

Or, for contemptuous words of a magistrate, not exercising his office. *R. Mo.* 247. *Cro. El.* 78.

Tho' he alleges a prescription for doing it. *R.* 2 *Leo.* 34. *Cro. El.* 689.

So, the law gives no authority to a justice of peace to detain a person suspected, but for a reasonable time till he may be examined.

As, if he be detained above three days in the justice's house, and then sent to another, or dismissed without examination. *R. Cro. El.* 829.

So, a custom, that he shall be imprisoned for not paying a duty, is not good. 3 *Keb.* 365.

So, a man shall not be arrested upon a process, when he attends a court of law, *nec eundo, aut redeundo*: as, if a man attend to give his answer to a bill in *Chancery*. 1 *Ch. R.* 92.

If he attend the quarter sessions of the peace, and be arrested in the face of the court. *R.* 1 *Brownl.* 15.

Or, going or coming back. *Cont.* 1 *Brownl.* 15. *Semb. acc.* 1 *Lev.* 159.

But a writ of privilege from the *custos rotulorum* does not excuse. *Ray.* 100.

#### (H 6.) Lawful Warrant.

So, a man may be imprisoned by a lawful warrant from any, who has a lawful authority. 2 *Inst.* 52.

As, by a warrant from the sheriff to his bailiff upon process to him.

By warrant of a justice of peace upon complaint or proof of an offence, if within his commission. *H. P. C.* 93.

Altho' he who complains does not know, but suspects *A.* to be the offender, if he be present upon the arrest of *A.* *H. P. C.* 93, 4.

Altho' no indictment be found for the offence. *Mod. Ca.* 179.

But a person arrested ought to be examined before his commitment.

What shall be an arrest, *vide in Execution*, (C 12.)—What a good warrant for the security of the peace, *vide Forcible Entry*, (D 18.)

(H 7.)

(H 7.) *What shall be a lawful warrant.*] A lawful warrant must be made under hand and seal. 2 *Inst.* 52. *H. P. C.* 94.

Must contain the cause of the commitment. 2 *Inst.* 52. 591. *H. P. C.* 94. 2 *Inst.* 591. *R. in Parl.* 3 *Car. Russw.* 513. *R.* 1 *Sal.* 347.

[A commitment in execution by a magistrate must state that the party has been *convicted*; setting forth that he was *charged* on oath with the offence is insufficient. *Rex v. Rhodes*, *E.* 31 *Geo.* 3. 4 *T. R.* 220. *Rex v. Cooper*, *H.* 36 *Geo.* 3. 6 *T. R.* 509.]

[A commitment in execution of a *rogue* and vagabond under the *stat.* 23 *Geo.* 3. c. 88. should state that the defendant was apprehended with the implements of house-breaking upon him *at the time of such apprehension*, &c. *Rex v. Brown*, *M.* 39 *Geo.* 3. 8 *T. R.* 26.]

[It is not necessary to state on a warrant of commitment on a charge of felony, that the act was done *feloniously*. 2 *T. R.* 255.]

[But, unless it sufficiently appear to the court, that a felony has been committed, they are bound to bail the defendant. *Id. ibid.*]

[Commitment by secretary of state for high treason may be made without oath. *Rex v. Wyndham*, *Str.* 2.]

[May be for high-treason generally. *Ibid.*]

[The warrant need not state the information, evidence, or grounds of the charge. *Rex v. Wilkes*, *P.* 3 *Geo.* 3. 2 *Will.* 151.]

[Warrant of commitment for a seditious libel need not set forth the libel. *Ibid.*]

[The warrant must specify to what gaol the party is to be carried. *Rex v. Smith*, *P.* 5 *Geo.* 2. *Str.* 934.]

Must have an apt conclusion, *viz.* *until delivered by law*. 2 *Inst.* 52. *H. P. C.* 94.

Or, *until further order*; for that imports by order of law. *R.* 1 *Lev.* 230. *cont.* 2 *Inst.* 52. 592. But that is to be taken for a further order of the party committing. 1 *Lev.* 230.

So, where a statute authorizes a commitment, it ought to conclude, *until he do that which the statute requires*. *R. Carth.* 152, 3.

And therefore, a commission by commissioners of bankrupts, *until he conform to their authorities*, is bad. *R.* 1 *Sal.* 348. *Vide Bankrupt*, (D 8.)

By the secretary of state, *until discharged by law*, where he was committed by the *st.* 35 *El.* 2. for not answering whether Jesuit or not. *R.* 1 *Sal.* 351. *Carth.* 291.

By a justice of peace, *until discharged by law*, where it was for not accounting as overseer by the *st.* 43 *El.* 2. *R. Carth.* 152.

So, a commitment or distress by a general warrant made before the offence committed, is bad, if a warrant is necessary. *Semb. Med. Ca.* 214.

[A justice of the peace cannot take a prisoner in *B. R.* and send him to the county-gaol, but he may charge him criminally in *B. R.* prison. *Rex v. Wordham*, *H.* 2 *Geo.* 2. *Str.* 828.]

[A warrant to *cause A. to appear*, is not a warrant to arrest. *Shergold v. Holloway*, *M.* 8 *Geo.* 2. *Str.* 1002.]

[Commitment of a carrier till he gives security, not to carry without university-licence, and to observe university-statutes for life, ill. *Rex v. Barnes*, *M.* 5 *Geo.* 2. *Str.* 917.]

[By *st.* 12 *Geo.* 2. c. 13. *st.* 4. the not indorsing attorney's name on a warrant upon writs, does not vitiate them.]

But a warrant will be good, tho' directed to a private person. *1 Sal. 347.*

Tho' it does not describe the offence plainly in the warrant; for it is sufficient to say, that he was an owler, smuggler, &c. *2 Mod. Ca. 5. Vide 2 Inst. 591.*

So, an officer at his peril must take the very offender named in his warrant. *11 H. 4. 91.*

If a warrant be against *B.* and *A.* calls himself *B.*, upon which the officer takes *A.*, false imprisonment lies. *R. Mo. 457. Hard. 323.*

So, an arrest after a *superfedas* is tortious. *R. 2 Rol. 552. l. 45.*

(H 8.) *What will be a justification to an officer, tho' not duly awarded.]* And a lawful warrant from him, who has jurisdiction of the cause, justifies the officer who executes it, altho' it was irregularly awarded: as, if a justice of peace grant a warrant for arresting for felony, before indictment against the party. *10 Co. 76. b.*

If a *capias* issue at the same time against the principal and his bail, when it ought to be first against the principal, and afterwards a *seire facias*, and not a *capias*, against the bail. *R. 2 Rol. 560. l. 40.*

If process for good behaviour issues irregularly out of the sessions of the peace. *R. Cro. Car. 602.*

If there be a warrant by a justice of peace against any one for not working in the highway, before summons or hearing. *R. 1 Vent. 273. cited Lut. 1563.*

If a *capias* issue out of an inferior court before summons. *Per Powel, Lut. 1565. R. cont. 1 Vent. 220.*

Or, a *capias ad satisfaciendum* out of *C. B.* with a *teste* out of term, tho' the writ be void. *Sal. 700.*

So, it justifies the officer, tho' there was not a proper foundation for such warrant, or process: as, if process issue out of an inferior court when there was no plaint. *Per Powel, Lut. 1565.*

So, tho' in reality there was no jurisdiction, if there be an appearance of a jurisdiction: as, if process issue out of an inferior court in a cause alleged within the jurisdiction, tho' in truth it arises out of it. *R. Lut. 937. 1566.*

If process issue upon a judgment in *C. B.* which is afterwards vacated for irregularity. *R. 1 Lev. 95.*

Or, upon a judgment there, when no judgment is entred upon the roll. *Mod. Ca. 184.*

If there be a commitment by a governor of the plantations and council there, upon examination of the offence, tho' there does not appear a good cause of commitment. *R. cont.; but the judgment was reversed in parliament. 3 Mod. 160.*

So, tho' no process of such a nature lies by law against such a person: as, if a *capias* be awarded against a peer of the realm. *10 Co. 76. b.*

So, tho' the judge be apparently mistaken: as, if the commissioners of excise determine small beer to be assessed as strong beer; for both are within their jurisdiction. *Per Hale, Hard. 484.*

If a justice of peace convict for more offences than he ought, or after a limited time. *Dub. Skin. 445. 566.*

[A peace officer may justify an arrest on a reasonable charge of felony, without a warrant, altho' it should afterwards appear that no felony



felony had been committed. *Samuel v. Payne, B. R. E. 20 Geo. 3. Dougl. 359.*

[But a private individual cannot. *Ibid. Vide infra Trespass, (B 5.)*]

(H 9.) *What not.*] But an officer shall not be excused, when the court or judge that awards the process, or warrant, has not jurisdiction of the cause: as, if there be process upon an appeal in *C. B.*

If there be a presentment in a leet for a private nuisance. *Per Hale, Hard. 484.*

If the commissioners of excise, who have jurisdiction for the excise upon strong-water, low-wine, &c. to be strong-water. *R. Hard. 482, 3, 4.*

If commissioners of bankrupts declare a man to be a bankrupt, who is not so. *Hard. 478.*

If the commissioners of the customs determine calicoe, silk, &c. to be linen. *Hard. 480.*

So, if the jurisdiction be confined to time, to place, to persons, or other circumstances, and the cause does not appear to be within such circumstances: as, if there be process upon a presentment at a leet held above a month after *Easter*, or *Michaelmas*. *Ca. Parl. 50.*

So, if a cause in an inferior court appears to arise out of the jurisdiction. *Semb. Lut. 1566.*

If upon a plaint in the Marshalsea, for a matter out of the verge. *Pl. Com. 37. b.*

Or, a presentment in a leet, for an offence out of the precinct of the leet. *Per Hale, Hard. 484.*

If a sheriff imprison a man, arrested upon a warrant to the bailiff of a franchise, out of his franchise. *Dub. Ray. 421. but afterwards per three J. it was R. cont. Ray. 467. 469.*

[The sheriff, having directed a warrant to *A.* and all his other officers to arrest *B.*; *A.* afterwards inserted the name of *C.*, and it was holden that the arrest by *C.* was illegal. *Housfn v. Barrow, B. R. M. 35 Geo. 3. 6 T. R. 122.*]

If an officer arrests by a warrant of the Ch. J. of *B. R.* after it was determined by the death of the king. *F. g. 80.*

So, where there are not such persons as can entitle the court to jurisdiction: as, if a plaint be in the Marshalsea, where neither party was of the king's household. *R. 10 Co. 77. a.*

So, if any circumstances requisite to entitle to the jurisdiction fail: as, where the *st. 23 H. 8. 5.* enables commissioners of sewers to charge all those who may have profit or loss, &c. according to the rate of every one's portion, &c. if they assess him who has land adjoining to the sea for repairing a wall, without others in the same level, who are in the same danger. *R. 5 Co. 100. a. Acc. 2 Cro. 336.*

So, where the *st. 33 H. 8. 6.* prohibits shooting in or carrying a hand gun, &c. the officer shall not be excused, upon a conviction against him who carries a gun in aid of the sheriff in the execution of process; for that is out of the jurisdiction. *5 Co. 72. a.*

So, where the *st. 43 El. 2.* enables to raise by taxation of inhabitants, &c. for the relief of the poor, &c. of the parish; if there be a tax upon the inhabitants of *B.* for the relief of the poor of *A.* *R. Cr. Car; 395.*

So, if process be merely null and void; as, if a *capias* out of C. B. be returnable, omitting a term. *Semb. per Holt, Sal. 700.*

So, if the matter be out of the jurisdiction, the officer shall not be excused, tho' he pleads his warrant specially. *Per Hale, Hard. 484.*

[If a justice of peace grants a warrant to arrest the party for non-payment of wages, it will not justify the officer. *Sbergold v. Hollaway, M. 8 G. 2. Str. 1002.*]

[If justices make adjudication for A. to pay 13*l.* for concealing run goods, and on the back a further adjudication to pay 5*s.* 4*d.* for costs, and grant warrant of distress to B. a constable to levy the 13*l.*, and on the back put also the 5*s.* 4*d.*, and on *nulla bona* returned grant warrant to B. to carry A. to gaol, and imprison till he pay 13*l.*, and A. tenders 13*l.*, and B. insists on the 5*s.* 4*d.* also, it is false imprisonment; for the 5*s.* 4*d.* is not in the warrant, nor have the justices power to give costs. *Smith v. Sibson, M. 20 G. 2. 1 Wilf. 153.*]

[General warrant of a secretary of state to apprehend without a name is illegal, and no justification of a king's messenger. *Huckle v. Money, M. 4 Geo. 3. 2 Wilf. 205. 1 Bl. Rep. 555.*]

[So, a warrant of a secretary of state, to seize a person by name, *his papers, books, &c.* is illegal, notwithstanding they have been frequently issued since the Revolution. *2 Wilf. 275. 292.*]

### (I) How a Prisoner shall be used.

**P**RISONERS ought to be kept *in salva & arcta custodia.* *2 Bul. 148. 191.*

By the *st.* 8 & 9 *W. 3.* 26. all prisoners for contempt, *mesne* process, or in execution, shall be actually detained in the prison of the King's Bench, and Fleet, or rules of the same, till discharged by law. [*Vide Rules, B. R. E. 30 G. 3. 3 T. R. 583. E. 35 G. 3. 6 T. R. 305. T. 36 G. 3. Ibid. 778. M. 37 Geo. 3. 7 T. R. 82.*]

But a gaoler shall not use duress for extorting money from a prisoner: and therefore, where a gaoler *pésuit prison. in profundo gaolo inter lenones,* &c. *quousque solvit 40 s.* he shall be fined for it. *12 Co. 127.*

Or, detained after his discharge till he pays for his liberty, *et pro ferris.* *12 Co. 127.*

Imprisonment ought to be *custodia, non pœna.* *Co. L. 260. a. Fl. 1. ca. 26. f. 1.*

So, no torture to a prisoner will be warranted by law, or prescription. *3 Inst. 35.*

And therefore, a prisoner cannot be put to the rack to extort a confession. *R. Rushw. 638.*

*Custodes gaolarum pœnam sibi commissis non augeant, nec quicquam torquent, vel redimant.* *Fl. 1. ca. 26. f. 5.*

They cannot use *suspensionem corporis per pedes, scissuram unguium.* *Fl. 1. ca. 26. f. 4.*

By the *st.* 1 *Ed. 3.* 7. they cannot by pain to a prisoner procure him to be an appealor of others; and the justices of both benches of assize, and gaol-delivery, may inquire of such pains, &c.

And by the *st.* 14 *Ed. 3.* 10. it is felony for a gaoler to force him to be an appealor. *Vide Justices, (S 1.)*

At common law they could not *onerare ferro;* yet by the *st.* *W. 2.*

13 Ed. 1. 11. it is enacted, that accomptants *carceri mancipentur in ferris*: and therefore, they may put irons upon their prisoners, for their safe-guard, if necessary. 2 Inst. 381. 1 Rol. 807. l. 5.

And for fear of bad usage, if a prisoner dies in gaol, the coroner ought to view his body before burial. Fl. 1. ca. 26. f. 5. H. P. C. 170.

Or, if a prisoner becomes decrepit, or infirm by means of so many irons, straitened in his sustenance, &c. he shall have an action upon the case against the gaoler. F. N. B. 93. H.

So, a prisoner shall be brought to his trial without severity. 2 Inst. 315, 316.

Shall not be put to his answer *in vinculis*. 3 Inst. 35.

*Non producat armatus*. Fl. 1. ca. 31.

*Non ligatus manibus*. Fl. 1. ca. 31. 2 Inst. 316.

And the judge ought to exhort him to make answer without fear.

2 Inst. 316.

But he shall have *compedes si necesse sit propter periculum evasionis*.

2 Inst. 316.

By the st. W. 2. 13 Ed. 1. 11. accomptants ought, in prison, *de suo proprio vivere*, and also other prisoners. 2 Inst. 381.

*De rebus propriis debent sustentari donec liberati fuerint, vel condemnati*. Fl. 1. ca. 26. f. 1.

And therefore, it was enacted by the st. *de catallis felonum*, that none should be disseised *de terris vel tenementis suis, vel de catallis suis, quousque convictus fuerit*. Fl. 1. ca. 26. Co. L. 391. a.

[By stat. 32 Geo. 2. c. 28. officer shall not carry prisoner to ale-house, or private house of officer, without his consent, nor charge him for liquor, but what he freely calls for, nor take any but legal fee, nor carry him to gaol in less than twenty-four hours, unless he refuses to be carried to a safe house (not his own) of his own nomination.]

[But this clause relates only to persons arrested on mesne process. *Evans v. Atkins*, B. R. H. 32 Geo. 3. 4 T. R. 555.]

[Officer is to take for lodging and diet, only what is allowed by quarter sessions.]

[Prisoner may have his meat and drink from whence he pleases, and also bedding and linen.]

[The two chief justices, and chief baron, and lord mayor and two aldermen for London, and three chiefs, and three justices for *Middlesex* and *Surry*, and quarter sessions for other counties, shall settle the fees for gaolers.]

[By stat. 13 Geo. 3. c. 58. quarter sessions shall ascertain how many clergymen shall attend each gaol, what duty they shall perform, and at what salary, not above 50*l.* per annum each; and shall nominate and displace such clergymen. And treasurer shall pay salaries.]

[By 14 Geo. 3. c. 59. quarter sessions shall order the walls and ceilings of gaols where felons are usually kept, to be scraped and white-washed once a year at least, regularly washed and kept clean, constantly supplied with fresh air by hand-ventilators or otherwise; two rooms (one for men, one for women) for the sick, whilst they shall be removed on being seized with any disorder, and kept separate from the healthy; a hot and cold bath or bathing-tub, and every prisoner to



be washed in one of them before they go out of gaol, on any occasion; to appoint surgeon or apothecary to attend, with a salary, who is to report the state of the gaol every quarter sessions; the courts of justice to be ventilated, clothes provided for prisoners; prisoners not to be kept under ground when it can be conveniently avoided,]

### (K) What is not a good Cause for Imprisonment.

**B**UT a man cannot be imprisoned without good cause. *R. 1 And. 298. Vide ante, (H 5.)*

So, he shall not be imprisoned after he be let to bail, tho' an *habeas corpus* comes for him. *R. 2 Rol. 558. l. 25.*

### (L) Remedy for false Imprisonment.

(L 1.) By Indictment.

**I**F a man be imprisoned without cause, there may be an indictment against him who did the wrong, upon the *st. M. Ch. 9 H. 3. 29. 2 Inst. 55.*

*Vide Indictment (D).*

(L 2.) By Action.

So, an action lies for false imprisonment against him who did the wrong. *2 Inst. 55.*

Or, an action founded upon *M. Ch. 9 H. 3. 29. 2 Inst. 55.*

And that, in all cases where a man is taken in custody for any time without lawful cause.

If process goes against *A.*, and *B.* acknowledges himself to be *A.*, yet he may have false imprisonment. *Hard. 323. Mo. 457.*

So, if a man taken for a lawful cause be continued after the cause removed, an action lies for false imprisonment: as, if the sheriff detain a man arrested upon process after a *superfedeas* delivered; for the detainer is a new imprisonment. *R. 2 Cro. 179.*

So, if he detain him after the plaintiff had discharged him of his prisoner. *R. 2 Cro. 379.*

But false imprisonment does not lie, where there was a lawful taking, tho' there be a neglect of duty afterwards: as, if he refuse bail; for the nonfeasance does not make him a trespasser-*ab initio*. *Vide Trespass (D).*

So, it does not lie against an inferior officer, who does his duty for a neglect or wrong in another: as, if by the command of the Ch. J. in court, the inferior officer takes a man and delivers him to the marshal, altho' he afterwards detain him unduly. *R. 2 Rol. 559. l. 5.*

If a man take another in aid of the sheriff, &c. altho' he does not return the writ, or make a false return. *R. 2 Rol. 562. l. 35. 50.*

So, it does not lie for taking the wife of *B.* where the judgment and writ was against the same woman before her marriage. *R. Cro. 323. 2 Bul. 80.*

*Vide Pleader, (3 M 22, &c.)*

(L 3.)

## (L 3.) By Writ de Odio &amp; Atiā, &amp;c.

So, by the common law, where a man was imprisoned, and might be bailed, a writ de odio & atiā lay, directed to the sheriff, *quod inquirat utrum A. captus & detentus in prisonā, rettatus sit odio & atiā.* 2 Inst. 42. 55. Vide Pleader, (3 K 1, &c.)

As, if he was taken for the death of a man. 2 Inst. 42.

And by the *st. W. 2. 29. appellati & indictati, ne diu detineantur in prisonā, habeant breve de odio & atiā.*

By the *st. M. Ch. 9 H. 3. 26.* nothing shall be given for obtaining it.

And altho' it was taken away by the *st. 28 Ed. 3. 9.* yet by the *st. 42 Ed. 3. 1.* all statutes against *M. Charta* are void, &c. whereby this writ is revived. 2 Inst. 43. 315.

After the writ delivered to the sheriff, by the *st. W. 1. 3 Ed. 1. 11.* he shall make inquiry *per probos homines*, &c.

If upon inquiry it be found, that he was accused by malice, or not guilty, or *se defendendo*, or *per infortunium*, a writ goes to the sheriff *de ponendo in ballium usque ad proximas assisas.* 2 Inst. 42.

Or, to twelve mainpernors. *Fl. 1. ca. 26. f. 3.* 2 Inst. 42.

But the writ de odio & atiā does not lie, if a man was indicted before justices in eyre. 2 Inst. 42.

## (L 4.) By Homine Replegiando.

So, a man unlawfully detained in custody may have an *homine replegiando*, *si non captus sit per preceptum regis, vel pro alio recto, quare secundum consuetudinem Angliæ non sit replegiabilis.* F. N. B. 66. E. Reg. 77. b. 2 Inst. 55.

And he may have an *homine replegiando* for a negro.

Or, an *Indian* brought by him into *England*, and detained from him. 3 Mod. 120.

[This is an original writ, the party may sue it of right, and it is granted on motion or petition in Chancery, without shewing cause, returnable in a court of law, and Chancery cannot supersede it. It may be declared on below, and defendant must assign cause why he does not comply; if the party suing has not a right, it must be pleaded.]

[If the party suing the writ is party in a suit in this court, it might be otherwise.]

[If it is brought by an infant against his testamentary guardian, or by a villein against his lord, they may plead the special matter at law. *Treb'cock's Case*, H. 1757, 1 Atkyns, 633.]

## (L 5.) By Discharge for Want of Prosecution.

By the *st. 31 Car. 2. 2.* if any be committed for treason or felony expressed in the warrant, on petition in open court the first week of the term, or first day of sessions of *oyer and terminer*, or general gaol-delivery to be tried, be not indicted the next term or sessions, he shall be bailed on motion, unless oath be, that the king's witnesses could not be then ready.

And, if on petition in court the first week of the term, or first day of the sessions to be tried, he be not indicted and tried the second term or sessions after commitment, or be then acquitted, he shall be discharged from his imprisonment. 2 Mod. Ca. 5. [A per-

[A person committed to the *Tower* for high treason, cannot make his prayer at the *Old Bailey*, to be bailed or tried. *Rex v. Bishop of Rochester*, Sept. 8 Geo. Fort. 101.]

[Nor, at *Hicks's Hall*. *Rex v. Ld. North and Grey*, Mich. Sef. 8 Geo. Fort. 103.]

### (M 1.) When delivered out of Prison.

**W**HEN a man may be delivered out of prison by bail, *vide* in *Bail*.  
When upon *habeas corpus*, *vide Habeas Corpus*.

[By *stat.* 32 Geo. 2. c. 28. any debtor in execution for not more than 100*l.* in all, may petition the court whence execution issued, with a schedule of his estate, and proof of 14 days notice to his creditors, and the court will order his creditors' appearance, and then order assignment of all his estate, and discharge the prisoner, unless the creditors agree to give him not exceeding 2*s.* 4*d.* a-week, or, if more creditors than one, 1*s.* 6*d.* each.]

[Which allowance must be paid every *Monday*. *Lench v. Pargiter*, B. R. H. 19 Geo. 3. Dougl. 68.]

[The creditors may compel the debtor to include in his schedule every thing that he can sell for his own benefit. But the half-pay of an officer is not the subject of sale, and therefore the creditors cannot compel him to include it in his schedule. *Flarty v. Odum*, B. R. T. 30 Geo. 3. 3 T. R. 681. *Lidderdale v. Montrose*, B. R. E. 31 Geo. 3. 4 T. R. 248.]

[By a subsequent act, *st.* 26 Geo. 3. c. 44. to continue for 5 years, the sum is extended to 200*l.*, and the benefit of the former act is extended to prisoners in custody on attachments for non-payment of money awarded to be paid under submission by rule of court; and for not paying costs duly taxed and allowed, after proper demand made; and also on writs of *excommunicato capiendo*, or other process for the non-payment of costs or expences in the ecclesiastical courts.]

[If the prisoner is 20 miles from *London*, the order may be to appear at the assizes.]

[In like manner, the creditor may compel the prisoner to deliver up his estate; if he refuses, he may be transported for seven years.]

[If he delivers false account, he is liable to penalties of perjury; if perjured, he may be taken in execution *de novo*, and never have the benefit of the act.]

[Prisoner's future effects are liable to debts unsatisfied, but he cannot be arrested for the same debt, nor be liable to action of debt on the judgment, but execution on it may go against his lands or goods; and none who have had the benefit of an act of insolvency can have the benefit of this act, unless compelled by creditor.]

[Defendants in *qui tam* actions are not included in 32 Geo. 2. c. 28. *st.* 13. *Hart v. Hawkins*, T. 2 Geo. 3. 3 B. M. 1322. 1 Bl. Rep. 372.]

[Under this statute the court will order petitioning debtor to be brought up again the last day of the term, instead of the first of next, if plaintiff and defendant live both in the same town, and plaintiff has had copy of the schedule 14 days. *Bates v. Gamble*, T. 3 Geo. 3. 3 B. M. 1393.]

[A man



[A man not in the actual custody of the gaoler, but in the custody of an officer in a spunging-house, is not within insolvent act. 1 Geo. 3. *Gander's Case*, M. 6 Geo. 3. 3 B. M. 1809.]

[The court may moderate the allowance, but when once settled it cannot be lowered. *Barnes*, 387. 397.]

[If prisoner removes himself, he loses the allowance. *Barnes*, 368.]

[The note for the allowance must be signed by plaintiff himself; the attorney is not sufficient, tho' plaintiff is abroad. *Barnes*, 371. 382. 399.]

[Tho' plaintiff is dead. *Rex v. Davis*, C. P. M. 39 G. 3. 1 Bof. & Pull. 336.]

[An insolvent debtor has a right to his discharge if his groats be not paid before ten at night of the day on which they are payable; and this right is not waived by the turnkey on the felons' side accepting them after that time. *Qu.* If the proper turnkey had accepted them? *Fisher v. Bull*, B. R. M. 33 Geo. 3. 5 T. R. 36.]

[A note for groats must be signed by all the creditors in the suit; if it be not, the defendant is entitled to his discharge, tho' he has received some payments under it. *Rex v. Wilkinson*, H. 37 Geo. 3. 7 T. R. 156.]

[When a debtor is in execution at the suit of several plaintiffs on a joint debt, one of them may give a note signed by him alone "for himself and partners," and it is the usual mode. *Meux v. Humphry*, B. R. M. 39 Geo. 3. 8 T. R. 25.]

[When several executors are plaintiffs, the note must be signed by them all. *Lepine v. Bayley*, B. R. T. 39 Geo. 3. 8 T. R. 325.]

[The court cannot under the words of the stat. 37 Geo. 3. c. 8. s. 2. moderate the sum to be paid to a prisoner on his being remanded, but a note must be signed for the full sum directed by the act. *Rex v. Davis*, C. P. M. 39 Geo. 3. 1 Bof. & Pull. 336.]

[Insolvent debtors petitioning under the lords' act, 32 Geo. 2. and subsequent acts for their relief shall be brought into court during term-time on Mondays and Thursdays only. *Reg. Gen. B. R.* H. 37 Geo. 3. 7 T. R. 454.]

[On plaintiff's death, prisoner shall be discharged on non-payment by executor. *Barnes*, 373.]

[On non-payment of allowance undertaken before judge of assize, he may be discharged. *Barnes*, 38.]

[A judge's order for a prisoner's discharge made out of term is final. *Lench v. Pargiter*, B. R. H. 19 Geo. 3. Dougl. 68.]

[One in custody upon an attachment for non-payment of costs may be discharged under the lords' act. *Rex v. Stokes*, B. R. T. 14 Geo. 3. 3 Cowp. 136. *Rex v. Myers*, B. R. E. 26 Geo. 3. 1 T. R. 265. *Bona-fous v. Schoole*, B. R. T. 31 Geo. 3. 4 T. R. 316. *Rex v. Pickerill*, B. R. T. 32 Geo. 4 T. R. 809.]

[An attorney in custody on an attachment for not paying over money received by him in the course of a suit, may be discharged under this act. *Rex v. Davis*, C. P. M. 39 Geo. 3. 1 Bof. & Pull. 336.]

[The creditor's being dead is no objection to his discharge. *Ibid.*]

[Prisoner may be discharged as to a debt under 100l. tho' after his petition he is charged by another plaintiff for a debt above 100l. *Barnes*, 381.]

[He must apply before the end of the first term after taken in execution. *Barnes*, 378. 394.]

[But

[But by 26 Geo. 3. c. 44. s. 5. where any debtor shall have neglected to take the benefit of the first act, within the time limited by that act, and shall have remained in prison by the space of one year, and shall make it appear to the court out of which the execution issued, that his neglect arose from ignorance or mistake, such debtor shall then be entitled to take the benefit of the said act, as if he had done it within the time limited.]

[Objections to the form of his schedule must be made at his first coming up. *Barnes*, 372.]

[If plaintiff absconds, rule *nisi* to discharge may be served on attorney. *Barnes*, 384.]

[If a prisoner discharged is again charged in execution on a second judgment by the same plaintiffs; on his second discharge, another schedule shall be made of the same effects with the first, and a second assignment to plaintiffs, to make them liable to second execution, if more than sufficient to satisfy the first. *Barnes*, 388. *Vide Pleader*, (2 G 16.)]

[When there is a bond and also a deed of covenant to secure an annuity, altho' the bond is forfeited before a discharge under the insolvent act of 16 Geo. 3. c. 38. the party may be sued on the covenant, for payment becoming due after the discharge. *Cotterel v. Hooke*, B. R. H. 19 Geo. 3. *Dougl.* 97.]

[By an *express* agreement the obligee of a bond to secure an annuity may waive the forfeiture for non-payment on the day, so as to be entitled to recover against the obligor, although he has been discharged under an insolvent debtor's act between the forfeiture and action brought. *Webster v. Bannister*, B. R. E. 20 Geo. 3. *Dougl.* 393.]

[An indorsee of a promissory note payable three months after date, may be discharged under an insolvent act, which takes place *before* the three months are expired, for it is *debitur in presenti, solvendum in futuro*. *Workman v. Leake*, B. R. H. 14 Geo. 3. *Cowp.* 22.]

[By the insolvent debtors' act of 18 Geo. 3. c. 52. the insolvent person is discharged as to bonds *executed before* the day in the act, but *not payable till after* the day. *Paget v. Wheate*, B. R. E. 21 Geo. 3. *Dougl.* 699.]

[If a person who has been discharged by an insolvent act brings an action, and recovers, on a promissory note made payable to him before his imprisonment, but not due till after his discharge, and which was not inserted in his schedule, he shall hold the money as a trustee for the assignees. *Brown v. Rivers*, B. R. M. 21 Geo. 3. *Dougl.* 472.]

[A prisoner, who has lost the benefit of the *stat.* 32 Geo. 2. c. 28. by the misconduct of his agent, may afterwards be discharged under the *stat.* 26 Geo. 3. c. 44. s. 5. which provides relief for those who have neglected to take advantage of the former act thro' *ignorance or mistake*. *Pearce v. Taylor*, B. R. E. 31 Geo. 3. 4 T. R. 231.]

[If a defendant be arrested on a *ca. sa.* and escape, and be afterwards retaken and committed to prison in the next term, he may apply in the following term to be discharged under the *stat.* 32 Geo. 2. for the words in that statute "charged in execution" mean being detained within the walls of the prison. *Vaughan v. Durnell*, B. R. T. 31 Geo. 3. 4 T. R. 367.]

[Prisoners on the 12th February 1794, whose debts in the whole do not amount to a larger sum than 1000*l.*, shall be discharged by virtue of

of the *stat. 34 Geo. 3. c. 69.* whose names have been inserted in lists, and who have acted in conformity to the directions of that act.]

[Those prisoners for debt only, who were in custody on the 12th February 1794, and have continued in the same prison to the time of their being carried to the sessions for their discharge, are entitled to the relief granted by this statute. *Rex v. Jones, M. 35 Geo. 3. 6 T. R. 28.*]

[If an insolvent debtor, brought up to the sessions under this act, be remanded under a charge against him of having obtained money by false pretences under sect 37. and he give notice that he will disprove the charge at a subsequent adjournment of the sessions, he is entitled to be brought up to the adjourned sessions for that purpose. *Rex v. Surry, M. 35 Geo. 3. 6 T. R. 76.*]

[If an instalment of an annuity be secured by bond, and be not paid on the day, the bond is forfeited, and the penalty is the debt in law; and a defendant having been charged in execution for the penalty of 1000*l.* under such circumstances previously to the last insolvent act 34 *Geo. 3. c. 69.* the court refused to order that sum to be reduced in the marshal's book to the sum actually due for the arrears of the annuity, in order that he might take the benefit of the act. *Judd v. Evans, B. R. T. 35 Geo. 3. 6 T. R. 399.*]

[A prisoner who is taken in execution for more than 300*l.*, and afterwards reduces his debt below that sum, is not entitled to be discharged in the next term after he has so reduced his debt, unless it be also the next term after he was taken in execution. *Ex parte Hubbard, C. P. E. 39 Geo. 3. 1 Bos. & Pull. Rep. 423.*]

[This act does not discharge the person of an insolvent (who is entitled to the benefit of the act) from the payment of the arrears of an annuity, becoming due after his discharge on a covenant made before the act. *Marks v. Upton, B. R. T. 37 Geo. 3. 7 T. R. 305.*]

[An insolvent person is discharged as to debts growing due as well as those due before the day; which words apply to a debt on a promissory note, bill of exchange, or bond given before, but not payable till after that day. *Kinnaird v. Barrow, B. R. M. 39 Geo. 3. 8 T. R. 49.*]

[An order for the discharge of an insolvent under the lords' act, *f. 16.* cannot be made by a judge in term, tho' summons were taken out in vacation, and the order only delayed till the beginning of term by an irregularity in the affidavits. *Haskins v. Morris, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 92.*]

[A note for the weekly payment of 3*s. 6d.* under the lords' act must be stamped. *Pitman v. Haynes, B. R. H. 38 Geo. 3. 7 T. R. 530. Bowring v. Edgar, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 270. cont. Tenell v. Casen, B. R. T. 38 Geo. 3. 7 T. R. 670.*]

[If a prisoner brought up to be discharged under *f. 16.* of the lords' act, deliver in a false schedule, and is remanded, the court will not at the instance of a creditor, even with the prisoner's consent, order him to be brought up a second time, for the purpose of amending his schedule and assigning over that property which he had before concealed. *Hutchins v. Hesketh, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 143.*]

(M 2.) By Consent of the Party.

If a prisoner goes out of prison by consent of the plaintiff, he shall be discharged. 'Tho'



Tho' the plaintiff allows him to treat for an accommodation, and he without a keeper, or a rule of court, comes to the plaintiff for such intent, and no agreement is made. *R. Sti.* 117. *Vide Escape* (D).

[The court will discharge a defendant out of custody who is in execution at the suit of a plaintiff some time since deceased, on whose part no will has been proved, nor any administration granted, and whose family, on notice of a motion for the above purpose, decline interfering. *Broughton v. Martin*, C. P. M. 38 Geo. 3. 1 Bos. & Pull. 176. *Wagstaffe v. Darby*, C. P. M. 6 Geo. 2. *Barnes*, 366.]

(M 3.) By breaking Prison.

What shall be an escape out of prison, and the remedy for it, *vide in Escape*, (B 1, &c.—C—D). *Vide Escape*.

What shall be a rescue, *vide Rescous* (A).—*Iustices* (R).

By the common law, breaking prison in every case was felony. 2 *Inst.* 589. *H. P. C.* 87.

But by the *st.* 1 *Ed.* 2. (which seems to be a confirmation of a like statute made 23 *Ed.* 1. 2 *Inst.* 589.) *nullus qui prisonam fregerit, subeat iudicium vite vel membrorum, nisi causa pro qua captus fuerit tale iudicium requirat*, &c.

If a man break out of the stocks, tho' he was not *infra parietes carceris*, it is a breaking prison within the statute. 2 *Inst.* 589. *H. P. C.* 107.

Or, out of the gaol of a lord of a franchise. *H. P. C.* 107.

Or, out of a church, where he has abjured. *H. P. C.* 107.

Or, out of the custody of a constable, or other person, who lawfully arrests or detains him. *H. P. C.* 107. 2 *Inst.* 589.

But if he escape before arrest, it is no felony; for he was not in prison. *H. P. C.* 111. 2 *Inst.* 590.

Breaking prison is no felony, if the prison be not actually broke. 2 *Inst.* 589. *H. P. C.* 108.

As, if the prisoner goes out when the door is open. 2 *Inst.* 589. *H. P. C.* 108.

Or, if the prison is broke by others without his privy. 2 *Inst.* 589. *H. P. C.* 108.

Or, he is rescued out of custody by others, without his privy. 2 *Inst.* 589. *H. P. C.* 108.

Or, is let out by consent of the gaoler. 2 *Inst.* 589. *H. P. C.* 108.

Or, if he break prison for necessity, when it is burnt by lightning, or by other persons, without his privy. 2 *Inst.* 590. *H. P. C.* 108.

Breaking prison is no felony, if the prisoner was committed for an offence, which does not require judgment of life or member: as, for petit larceny. 2 *Inst.* 590. *H. P. C.* 110.

For homicide *se defendendo*, or by chance medley. 2 *Inst.* 590. *H. P. C.* 110.

For giving a mortal wound of which a man dies within a year; for tho' the death relates to the wound, yet it was not felony at the time of breaking prison. 2 *Inst.* 591. *H. P. C.* 108.

For suspicion of felony not found by record, when no felony is committed. *H. P. C.* 109. 2 *Inst.* 590.

Or, if the prisoner was committed without lawful warrant. 2 *Inst.* 590, 591. *H. P. C.* 109.

Or,

Or, if the warrant does not shew a cause, that requires judgment of life or member. 2 *Inst.* 591.

But breaking prison is felony, if the prisoner be committed by a *capias* upon an indictment, or appeal, or other record finding the felony, tho' no felony was committed. 2 *Inst.* 590. *H. P. C.* 109.

Or, if committed only on suspicion of felony, when a felony was committed. 2 *Inst.* 590. 592. *H. P. C.* 109.

Or, committed for a felony made so by statute subsequent to 1 *Ed.* 2. *H. P. C.* 108. 2 *Inst.* 592.

If committed for treason, breaking prison is only felony. 2 *Inst.* 590. *H. P. C.* 109.

Yet breaking prison with intent to deliver traitors is treason; for it is an abetting of treason, in which there are no accessories. 2 *Inst.* 590. *H. P. C.* 109.

A man may be indicted for breaking prison, before he be convicted of the felony; for which he was committed. 2 *Inst.* 592. *H. P. C.* 110.

But the indictment ought to be special, and shew that he was committed for felony. 2 *Inst.* 591. *H. P. C.* 109.

# IMPROPRIATION.

*Vide Advowson* (E).

# IN CASU PROVISIO.

*Vide Dum fuit infra Ætatem* (D).

# INCIDENT.

*Vide Condition*, (G 10.)—*Courts*, (P 4.)—*Franchises*, (F 10, &c.)—*Grant*, (E 11.)—*Homage*, (G 2, 3.)—*Parceners*, (A 3, &c.)—*Prohibition*, (G 23.)—*Rent*, (C 4.)

# INCLOSURE.

*Vide Common.*—*Droit*, (M 1, 2.)

# IN CONSIMILI CASU.

*Vide Dum fuit infra Ætatem* (E).

# INCUMBRANCE.

*Vide Chancery*, (4 A 10.—4 I 3, &c.)

# INDENTURE.

*Vide Fait*, (C 1, 2.)

# INDICAVIT.

*Vide Dismes*, (M 10.)

## INDICTMENT.

## (A) Indictment; What shall be.

**A**N indictment is an accusation or declaration at the suit of the king, for some offence, found by a proper jury of twelve men. *Co. L. 126. b.*

[If to an action for slander, in charging the plaintiff with felony, a justification is pleaded, which is found by the jury, that of itself amounts to an indictment; as, if it had been found by the grand inquest, and is sufficient to put the party thus accused on his trial. By *Buller J. Rex v. Jolliffe, T. 31 Geo. 3. 4 T. R. 293.*]

And it ought to be found in the same county, where the offence was committed. *H. P. C. 203. Vide Action, (N 9.)*

So, by the *st. 11 H. 4. 9.* an indictment shall be void, unless made by enquests of the king's liege people, returned by sheriffs or bailiffs of franchises, without nomination of any: of which enquests none shall be outlawed, or fled to sanctuary for treason, or felony.

So, if any one was outlawed, or returned at the nomination of the party, &c. the whole indictment will be avoided, tho' twenty others were upon the same enquest. *H. P. C. 202.*

And therefore, an indictment, which does not appear to be before twelve *probos et legales homines* in the same county, shall be quashed. *R. 2 Rol. 82.*

The indorsement upon the indictment made by the jury is part of the indictment. *R. Yel. 99.*

And if the jury find *billa vera* for part, and *ignoramus* for other part, it is void; for they ought to find the whole or nothing. *R. Yel. 99. 1 Sid. 414.*

[But if the indictment have more than one count they may find *billa vera* for one, and *ignoramus* for the rest. *Cowp. 325.*]

So, if they find it conditionally; as, *si messuagiam sit in possessione domini regis tunc billa vera.* *R. Yel. 15.*

Or, *quæ est billa vera*, without saying expressly *quod est.* *2 Mod. Ca. 296.*

So, upon an indictment for murder against *A.* and *B.*, if they find *billa vera quoad A.*, and *quoad B.* only manslaughter. *R. 1 Rol. 407.*

So, if upon an indictment for murder, they find *billa vera se defendendo.* *R. 2 Rol. 52.*

If, upon an indictment for a libel, they find *quoad* the words *billa vera, sed utrum malitiose ignoramus.* *R. 1 Leo. 287.*

But finding *quod separales presentes sunt billa vera* is well; for that extends to all. *R. 1 Sal. 376.*

[If the caption is *ad festum Epiphaniæ*, instead of *Epiphaniæ*, it is ill. *Rex v. Warre, P. 12 G. Str. 698.*]

## (B) Presentment; What.

**A** Presentment is, when the jury present an offence to the court, without an indictment delivered to them. *2 Inst. 739.*

And therefore, every indictment contains a presentment, but not *è contra.* *2 Inst. 739.*

As, if a presentment be found by a subsequent jury, *quod prædict. indicta-*



*indictamentum est billa vera*, it shall be quashed: for it is no indictment till the finding. *R. 1 Sal. 376.*

### (C) When necessary.

**A**N accusation for treason, felony, or other offence, generally, ought to be by indictment, or presentment. *2 Inst. 46.*

But at common law, if any was taken for larceny in the manor, and brought presently into court, he might be arraigned without indictment; and such was the custom of *ing fantheof* in some manors. *H. P. C. 198.*

[But this proceeding on the manner seems wholly taken away by the statutes *25 Ed. 3. c. 4. 28 Ed. 3. c. 3. 42 Ed. 3. c. 3. 2 H. H. P. C. 149.*]

So, in trespass, if a verdict finds, that the defendant stole the goods, he may be put to answer, without other indictment. *H. P. C. 199.*

[But this must be in a court which has criminal jurisdiction. *2 Hawk. 303. 2 H. H. P. C. 151.*]

If an approver charge *B.* and afterwards waive his charge, the king may proceed against *B.* thereupon, without indictment. *Sho. 109. [2 H. H. P. C. 149, 150.]*

So, if an appellant be nonsuited, the king may proceed against the appellee, without indictment. *Sho. 109. H. P. C. 199. [2 H. H. P. C. 221. Vide 2 H. H. P. C. 65.]*

So, a man may be charged for an offence under felony by information. *1 Sho. 107, &c. 5 Mod. 459. Vide Information, (A 1.)*

### (D) For What Offence an Indictment lies.

**A**N indictment lies for every crime by common law, or statute: as, for treason or felony. *Vide Information (B).*

Misprision, perjury, subordination, forgery, &c.

So, for kidnapping. *Comb. 10.*

[For extortion, indictment may be at sessions. *Rex v. Loggan, H. 4 G. Str. 73.*]

So, for a conspiracy to charge one with an offence, without more. *R. Mod. Ca. 185.*

[And the conspiracy may be laid without any overt act; and if one be convicted, judgment may be given against him before the trial of the other. *Str. 193.*]

[So, for conspiring falsely and without any probable cause to charge a man with having taken out of a bag belonging to one of the defendants a certain quantity of human hair, the goods and chattels of the said defendant (tho' the charge made by the conspirators do not allege the taking to have been either *felonious* or *unlawful*). *3 B. M. 1321.*]

[And the justices of peace at their sessions have jurisdiction over such offence; a conspiracy being a trespass, and tending to a breach of the peace. *Ibid.*]

[An indictment lies for conspiring to pervert the course of justice by producing a false certificate, by justices of the peace, that an in-

dicted highway is in repair, in evidence to influence the judgment of the court. *Rex v. Mawbey, E. 36 Geo. 3. 6 T. R. 619.*

[In stating such a crime in an indictment it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false, it is sufficient that for such purposes they agreed to certify the fact as true, without knowing that it was so. *Ibid.*]

[An indictment lies for obstructing an officer in the execution of his duty.—In such an indictment for obstructing an excise officer in seizing of soap, it is necessary to shew that he had a warrant. *Rex v. Brady, Excheq. Cham. M. 38 Geo. 3. 1 Bos. & Pull. 187.*]

[The words *on shore* in the *stat. 24 Geo. 3. sess. 2. c. 47. s. 15.* mean only *on land*, at any distance from the sea, as distinguished from on board of ship. *Ibid.*]

So, for every misdemeanor to the prejudice of the public good: as, for a libel against the government, or a magistrate. *Sal. 698. 3 Mod. 139.*

Tho' the words are not actionable. *R. 3 Mod. 139. Vide Libel, (A 1, &c.)*

For words which tend directly to the breach of the peace. *Sal. 698.*

So, for every breach of the peace; as, false imprisonment. *2 Inst. 55.*

Battery, riot, &c.

Sending a challenge. *Comb. 10. Sal. 698.*

Debauching another man's wife. *Comb. 377.*

For an abuse in the execution of an office: as, the removal of a sick poor person. *2 Mod. Ca. 326.*

[Against a constable, for discharging a person brought to the watch-house by a watchman in the night. *Rex v. Bootie, T. 32 & 33 G. 2. 2 B. M. 864.*]

For a refusal in any officer to execute his office. *R. 1 Sal. 381. Skin. 370. 2 Sho. 75.*

[For refusing to execute the office of constable *Rex v. Lone, M. 5 Geo. 2. Str. 920.*]

[But an indictment for not serving the office of constable under an appointment by a corporation, without shewing a right in the corporation to appoint by grant or prescription is bad. *Doug. 534.*]

[For not taking upon him the office of overseer, when appointed; for disobeying an act of parliament, is indictable by the principles of common. *Rex v. Jones, M. 14 Geo. 2. Str. 1146.*]

Or, a refusal to receive or maintain his apprentice. *R. 1 Sal. 381. Mod. Ca. 163.*

So, for a bad contrivance, tho' it be not executed: as, for a contrivance to kill such a one. *R. 1 Sid. 231.*

[Or, for any thing against decency and good manners; as, for taking up dead bodies, tho' for the purpose of dissection. *2 T. R. 733.*]

[For an attempt to pick a pocket; to commit sodomy. *Str. 196.*]

[To charge one with a bastard, whereby he may gain money from him. *R. 1 Vent. 304, 5.*]

If one slander a justice of peace in the execution of his office. *Com. 46. 65.*

[For

[For saying of a justice of the peace, in the execution of his office, *you are a rogue and a liar.* *Rex v. Revel*, P. 7 G. Str. 420.]

[An indictment lies against the overseer of the poor, for refusing to receive a pauper removed by order of two justices, under 13 & 14 C. 2. c. 12. *Rex v. Davis*, M. 28 Geo. 2. 2 B. M. 799.]

If any one collect money for the public use, and do not pay it. 1 Rol. 2.

So, if he refuse to be a juror within his wardmote. *Semb.* 2 Sho. 529.

[Against a parishioner, for not doing his highway-labour. *Rex v. Boyall*, T. 32 & 33 G. 2. 2 B. M. 832.]

So, for a great immorality in public (but it was accompanied with a riot). R. 1 Sid. 168.

For setting up a mountebank's stage. *Comb.* 304.

So, for a fraud or deceit upon a particular person: as, for playing with false dice. R. 2 Rol. 107.

Pretending to be a broker and selling beer, for *Portuguese* wine. *Mod. Ca.* 301.

For forging a protection, tho' he could not use it. 1 Sid. 142.

If a tradesman commits a deceit, or abuse in his trade. *Per Holt*, *Comb.* 16.

If any one by false insinuations gets a note, an account signed, &c. into his hands, and then cancels it. *Mod. Ca.* 175.

So, for any thing generally prohibited by statute, if it be done, an indictment lies for it: as, for champerty. *Cr. Just.* 87. b. [*Rex v. Harris*, H. 31 Geo. 3. 4 T. R. 202.] *Vide in Actions upon Statutes.*

For being a vagabond. R. 2 Cro. 577. 2 Rol. 172.

For selling in pots unsealed. 1 Sid. 409. 1 Vent. 13.

For travelling with more than five horses, contrary to the stat. 22 Car. 2. 4 Mod. 145.

So, if a thing before unlawful be prohibited by statute, and a particular remedy or method directed for the punishment, yet an indictment lies for it; as, for keeping hogs in the city of London, contrary to the st. 2 W. & M. 8. s. 20. for it is a nuisance by the common law. *Sal.* 460.

[Where the offence intended to be guarded against by a statute was punishable before, there the particular remedy given by statute is *cumulative*, and does not take away the former; where the statute enacts, that what was not punishable before, shall now be punishable in such a particular manner, there that method must be pursued, and not indictment. *Rex v. Robinson*, T. 32 & 33 G. 2. 2 B. M. 799.]

[Therefore an indictment lies for disobedience to an order of sessions, it being an offence indictable at common law. *Ibid.*]

[And where no particular remedy is pointed out by the statute giving the sessions jurisdiction, or where such remedy is given, but by any circumstance is rendered impracticable, there the only remedy is by indictment. *Ibid.*]

[But where the summary remedy can be pursued, it is unreasonable, oppressive and wrong, to take the remedy by indictment. *Ibid.*]

So, an indictment lies for a thing to the public damage, tho' prohibited only by a private statute. *Per Twissd.* 1 Sid. 209.

For a common nuisance.



[For a smell, tho' not unwholesome, if it renders the enjoyment of life and property uncomfortable, (as Dr. *Ward's aqua fortis* works.) *Rex v. White*, P. 30 G. 2. 1 B. M. 333.]

[For making great noises in the night with a speaking trumpet. *Rex v. Smith*, T. 12 G. Str. 704.]

[For setting up a fair, market, leet, &c. *Mod. Ca.* 183.]

For fishing in another's fish-pond. *Mod. Ca.* 183.

[For having coining tools. *Rex v. Sutton*, P. 10 Geo. 2. Str. 1074.]

[If they are only to stamp part of one side of the coin (as to make a sceptre) it is not treason within 8 & 9 W. c. 25. but only a misdemeanor at common law. *Rex v. Sutton*, P. 10 G. 2. B. R. H. 371.]

### (E) For what, not.

**BUT** no indictment lies for a thing prohibited by a statute which directs a particular method of prosecution, if it was no offence before: as, for keeping an alehouse without licence. *Per Haught.* 2 Rol. 398. Pal. 388. R. in *Joice's Case*, Sho. 399. Semb. Sho. 398, 9. R. Sal. 460. *Mod. Ca.* 86.—*Per two J. Ch. Just. cont.* 4 Mod. 144. *Dub. per Holt*, Comb. 405. [2 Bur. 799.]

[For killing a hare. *Rex v. Buck*, H. 12 G. Str. 679.]

[For an offence for which a penalty is inflicted by statute, without saying to whom, or how recoverable. *Rex v. Malland*, H. 2 G. 2. Str. 828. *Vide Forfeiture (C).*]

For being a justice of peace, when he had not 20 l. *per annum*. R. 2 Cro. 643, 4. 2 Rol. 247, 8.

If a non-conformist come within five miles of a corporation, where the st. 17 Car. 2. 2. gives 40 l. penalty to be recovered by debt or information. R. cont. *per two J.* 1 Mod. 34. 1 Vent. 63. 1 Sid. 439.

But the reporter makes a *quare*, and Sho. doubts of it. Sho. 399. *Denied to be law*, F. g. 47.

If an overseer refuse to make an account. *Dub.* 5 Mod. 180.

If a man having lands which maintain a plough, do not send his cart to the repair of the highway. *Dub.* 2 Rol. 412.

If any make bricks contrary to st. Geo. which gives a penalty. F. g. 47.

So, an indictment does not lie for a thing prohibited by a private statute, which tends only to the damage of a particular person. 1 Sid. 208, 209.

So, an indictment does not lie for a misdemeanor, which prejudices a particular person only: as, for enticing away an apprentice from his service. R. 1 Sal. 380. *Dub. Mod. Ca.* 99. *Acc. Mod. Ca.* 182.

[For a trespass of a private nature, tho' laid *vi et armis*; as, for entering a yard, and erecting a shed, or for pulling the thatch off a house, or for entering a field, by sixteen persons, and keeping prosecutor out of possession, if no riot or unlawful assembly. *Rex v. Storr*, *Rex v. Atkins*, *Rex v. Gillet*, *Rex v. Bake*, T. 5 G. 3. 3 B. M. 1698, 1706, 1727, 1731.]

[For a deceit of a private nature, as for not delivering the quantity of beer agreed for and paid for. *Rex v. Combrune*, P. 24 Geo. 2. 1 Wilf. 301. *Rex v. Wheatley*, B. R. H. 1 Geo. 3. 2 Burr. 1125. *Rex v. Dunnage*, H. 1 Geo. 3. 2 Burr. 1130.] [An

[An indictment at common law, charging that the defendant deceitfully intending by crafty means and devices to obtain possession of certain lottery tickets the property of *A.*, pretended that he wanted to purchase them for a valuable consideration, and delivered to *A.* a fictitious order, &c. purporting to be a draft on his banker for the amount, which he knew he had no authority to draw, and would not be paid, by virtue of which he obtained possession of the tickets, and defrauded the prosecutor of their value, cannot be maintained, because it does not charge the defendant with having used any false token to accomplish the deceit. *Rex v. Lava*, *H.* 36 Geo. 3. 6 T. R. 565.]

[For selling short measure, tho' it lies for selling by false measure; thus, selling for two chaldron of coals a quantity defective by four bushels, of what two chaldrons ought to be, is bad. *Rex v. Osborn*, *T.* 5 G. 3. 3 B. M. 1697.]

[So, an indictment does not lie for knowingly exposing to sale and selling unwrought gold under the sterling alloy, as and for gold of the true standard weight, for it is not indictable in a private person: the statutes relate only to goldsmiths, and it is not a common law offence, being only a private cheat. *Rex v. Bower*, *Cowp.* 323.]

For inclosing land, whereby commoners cannot take their common. *Semb. Cro. El.* 90.

For cheating in wadding cloth to the 3d but not to the 4th stall, as usage requires. *R. Skin.* 109.

So, it does not lie for unmannerly words of a mayor, &c. of a corporation, tho' they are a cause for surety of his good behaviour, and for a commitment unless he gives surety. *R. Sal.* 697. *Mod. Ca.* 124.

Nor, for words to the prejudice of a market of a corporation. *R. 1 Sal.* 370.

Or, to the scandal of a justice of peace for such a particular fact. *R. Sal.* 698.

So, it does not lie for imposing upon the credulity of another; as, if he receive money from *B.* alleging that *A.* sent him for it, whereas *A.* did not send him; unless he comes with false tokens. *R. 1 Sal.* 379. *Mod. Ca.* 105.

[The words "purporting to be a bank-notey in an indictment, mean that the note upon the face of it appears to be a bank-note, and the want of such appearance cannot be supplied by evidence of representations of the party when he disposed of it: but he may be indicted for a fraud. *Doug.* 300.]

[For a bare attempt to defraud; if no false tokens, nor fraud committed, nor conspiracy. *Rex v. Bryan*, *P.* 3 G. 2. *Str.* 866.]

If a man upon payment of money do not deliver the goods pledged for it. *1 Sal.* 379.

[Against a miller, for detaining part of the corn. *Rex v. Channel*, *H.* 1 G. 2. *Str.* 793.]

So, an indictment does not lie against a justice of peace, &c. for not committing a rioter charged by oath; for he is the judge in such a case. *Comb.* 317.

[For casual damage in doing a lawful act; as, in unloading goods, if the wind blows them upon a passer by. *Rex v. Gill*, *T.* 5 Geo. *Str.* 190.]

[For secreting *A.* who affirmed she was with child of a bastard by him. *Rex v. Chaundler, M. 11 Geo. 2 Ld. Raym. 1368.*]

[For bringing a bastard child into a parish. *Rex v. Warne, M. 12 Geo. Str. 644.*]

[For a conspiracy to marry a pauper settled in *A.* to a person settled in *B.* in order to bring a charge on *B.* *Rex v. Edwards, T. 12 Geo. Str. 707. Sed. semb. information lies.*]

[For keeping a lying-in hospital for unmarried women, whereby the parish is burthened with bastards. *Rex v. Macdonald, H. 5 G. 3. 3 B. M. 1645. Vide stat. 13 G. 3. c. 82.*]

[Not every conspiracy is a ground for a criminal prosecution (as setting up a bastard child); and the boundaries are often nice, between a matter indictable and a fraud cognizable in equity. *Chetwynd v. Lindon, T. 1752, 2 Vesey, 450.*]

[An assault on two persons cannot be joined in the same indictment. *Rex v. Clendon, T. 4 Geo. 2. Str. 870. Ld. Raym. 1572.*]

[This is held not to be law. The king may call a man to account for breach of the peace, by breaking two heads instead of one. There have been many informations for libels against the king and his ministers. *Rex v. Benfield, P. 33 Geo. 2. 2 B. M. 980.*]

So, after verdict judgment shall be arrested. *Rex v. Wheatley, Rex v. Dunnage, H. 1 Geo. 3. 2 B. M. 1125. 1130.*]

[The *stat. 4 Geo. 3. c. 90.* having enacted, that until a poor-house should be built for the hundred of *L.* and *C.* the poor should continue under the government and management of the overseers of the poor, and after that time under the government and management of the guardians of the poor appointed by that act; it was holden, that after the poor-house was built the overseers of the poor, and county magistrates had no authority in this district as far as respected the poor, and consequently that the overseers were not indictable for disobeying an order of justices made for the relief of a pauper within it. *Rex v. Keer, H. 33 Geo. 3. 5 T. R. 159.*]

### (F) When an Indictment against several is good.

SO, for an offence joint and several in its nature, two may be indicted together: as, for a trespass. *1 Sal. 384.*

For extortion. *R. 1 Sal. 382.*

Husband and wife for keeping a bawdy-house; for it is a nuisance. *R. 1 Sal. 384.*

So, for keeping several inns *separaliter, ad nocumentum.* *2 Rol. 345.*

But where a single act makes an offence, several cannot be indicted for the same act: as, for using a trade without being an apprentice. *1 Sal. 382.*

For having inmates in their houses. *R. 2 Rol. 164.*

For doing a thing against a statute, or proclamation. *Mod. Ca. 210.*

So, if several are joined to the same indictment for having several inns, they must be charged severally for their offence. *R. 2 Rol. 345.*

[A wife or servant joining with a stranger in the same murder, may be charged in one indictment, and concluding *felonice proditorie et ex malitia premeditata, &c.* is good for both, *reddendo singula singulis.* *Foster, 320.*]

[But



[But several persons cannot be joined in one indictment for perjury, for it is a separate act in each. *Str.* 921.]

[And the general rule is that where the offence is one entire joint act, one indictment or information may lie against several; but where the offence of one cannot be considered as the offence of the other, there one indictment, &c. will not lie for both. *2 Bur.* 984.]

[Where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty; as well for acts of commission as for omission. *Rex v. Holland, E. 34 Geo. 3. 5 T.R.* 607.]

### (G) The Form of an Indictment.

(G 1.) It ought to have Certainty.

(G 1.) *Of the* [IN a criminal charge, there is no latitude of indictment to include more than is charged; the charge must be explicit enough to support itself. *2 B. M.* 1127. *Vide Abatement, (F 22, &c.)*]

An indictment ought to be certain. *5 Co.* 121. *a.* *1 T. R.* 69.

Yet, certainty to a general intent is sufficient. *Co. L.* 303. *a.* *5 Co.* 121. *a.* [*Dougl.* 158. *Cowp.* 682.]

And therefore, an indictment ought to shew the christian and surname of the defendant.

And by the common law, if the defendant had a dignity, it ought to add his dignity; for it is parcel of his name.

So, if he had an office, and was indicted in respect to his office, it ought to add his name of office.

So, by the *st.* 1 *H.* 5. 5. the addition of the defendant's estate, degree, or mystery, the town, or place, and the county of which he is or was; and if omitted, outlawry thereon shall be void, and the indictment may be abated by exception. *R.* 2 *Roll.* 225. *Vide Abatement, (F 23, &c.)*

The addition may now be of a degree by creation, or without creation: as, *earl, bishop, knight, esquire, gentleman, widow, doctor, clerk, &c.* *2 Inst.* 666.

Or, of an occupation; as, *merchant, grocer, labourer, spinster, &c.* *2 Inst.* 668.]

And his reputed degree is sufficient; as, if he be called *gentleman*, where he was only *yeoman* in truth. *R.* 6 *Co.* 67. *3 Inst.* 668.

But if he be called *yeoman, spinster, &c.* where in truth he is a *gentleman*, and so reputed, the indictment shall be quashed. *2 Inst.* 667, 668.

But an addition of office is not sufficient, unless he be indicted in respect of his office; for it is uncertain, being competent to all degrees; as, *farmer, butler, servant.* *2 Inst.* 668.

Nor, an addition of *citizen*; for it does not shew his degree, or mystery. *2 Inst.* 668.

Nor, of *vagabond, heretic*, and the like. *2 Inst.* 668.

If a mercer, &c. be a gentleman, he ought to be named by the highest, viz. *gentleman.* *2 Inst.* 668, 669.

And the addition ought to be annexed to the person indicted; for after an *alias dictus*, it is not sufficient. *4 Ed.* 4. 10. *a.* *2 Inst.* 669.

So, *A. uxor B. spinster*, for it may be referred to *A.* or *B.* *Dy.* 46. *b.*

Otherwise, if it was *A. uxor E. nuper yeoman*; for that cannot be referred to the wife but only to the husband. *R. Dy. 47. a. Cro. E. 750.*

The addition of the place may be, *nuper*. *2 Inst. 669, 670.*

If a city or borough be a county, the addition of that only (as of *London*) is sufficient. *2 Inst. 669.*

The addition of a parish is sufficient. *2 Inst. 669.*

But if there be two towns in one parish, he ought to be named of one of the towns. *2 Inst. 669.*

Or, if there be *D. magna & parva*, the addition of *D.* alone is not good. *2 Inst. 669.*

It ought to be plainly expressed that he is of such a place: and therefore, *A. mercator de London* is not sufficient; for perhaps he does not reside in *London*. *4 Ed. 4. 10. a.*

So, *A. parson of D.*; for he may be parson there without residence. *Cont.* for non-residence shall not be intended. *2 Inst. 669.*

If an indictment gives a bad addition, it will be helped by the appearance of the defendant. *2 Inst. 670.*

So, if there be no addition. *Per Keiling, 1 Sid. 247.*

And an outlawry upon it shall be avoided only by error, or plea, tho' by the statute it is said to be void. *2 Inst. 670.*

It is sufficient if the addition be in *English*. *R. 1 Sid. 101.*

If there be an indictment as accessory, it must have the name of the principal.

If the surname be mistaken in an indictment, he shall answer to the felony. *1 H. 5. 5. b. As, Martyn for Morten. R. Kelg, 12.*

Otherwise, if his name of baptism be mistaken. *11 H. 4. 41. b. F. Corone, 88.*

So, in treason, or trespass, *quod procuravit quendam ignotum*, is sufficient; for all are principals.

Or, *quod quidam ignotus* in a vizor gave the mortal stroke. *R. Kel, 10.*

(G 2.) *Of the time and place.*] So, it ought to shew the day and year of the offence. *St. 95. a. Vide ante, (G 1.)*

And the place. *Dy. 69. 1 Sal. 380. R. Latch, 194. St. 95. a. [1 T. R. 69. 754.]*

And by the *st. 18 H. 6. 12.* if a place be alleged and there is no such, it is void.

So, if the day of the month be named without the year, it is not good.

Or, if the day be uncertain; as, in *Festo S. Petri*, when there are two feasts of *St. Peter*.

So, the time and place ought to be repeated to every material fact: and therefore, *quod M. apud B. insulium fecit & cum gladio felonice percussit*, without saying, *ad tunc & ibidem percussit*, is bad. *Dy. 68, 69. Rex v. Holland, E. 34 Geo. 3. 5 T. R. 607.*

So, the reference ought to be to a time or place certain: as, if it says, *quod percussit apud A. in comitatu predicto*, where two counties are mentioned before, tho' one was in the addition only. *R. 1 Rel. 223.*

[Stating the defendant to be late of *W.* and laying the offence to be at the parish aforesaid, was holden not sufficiently certain. *Rex v. Matthews, H. 33 Geo. 3. 5 T. R. 162.*] But

But the hour is not necessary in an indictment, tho' it is in an appeal. 2 *Inst.* 314. *Mar. pl.* 127.

So, it is sufficient, if the time be ascertained by the caption: as, 1<sup>o</sup> *M. ult.* without the year; for that appears by the caption.

So, 1<sup>o</sup> *die post Pasch. ult.*

So, *Octab. Trin. &c.* which shall be intended 8<sup>o</sup> *die* not 4<sup>o</sup> *die post.*

So, *diversis vicibus inter* such a day and such a day, is sufficient in an information. *R. 2 Lev.* 71.

So, the precise day is not necessary; for he may be found guilty if the offence was at a former, or a subsequent day. *R. 2 Inst.* 318.

And if the offence be proved at a day before or after the time alleged in the indictment, it will be well. *R. upon an Indictment for High Treason. Kelz,* 16.

Tho' it was eleven or twelve years before. *Kelz,* 16.

So, in every indictment for treason, felony, &c. *R. per all the Judges,* 3 *Inst.* 230. *Syer.*

[Indictments for treason, by levying war, do generally charge the overt acts, but one day only. *Townley's Case,* 1746, *Foster,* 7.]

And if the offence was at a day after the time in the indictment, the jury may find the very day of the fact to ascertain the forfeiture, or if they find the party guilty generally, a lessee, &c. may falsify as to the time, tho' not as to the offence, for avoiding the forfeiture. 3 *R. Inst.* 230.

So, to a neglect or nonfeasance no time is necessary; for the present time shall be intended: as, *quod non escuriavit fossam, &c.*

So, the place is sufficient, without the county; if the county be in the margin.

[In criminal cases, tho' the county be in the margin, yet the place where the fact is supposed to be done, must be laid in the body of the indictment to be *in com. predict.* *Rex v. Burrridge, M.* 1735, 3 *P. W.* 439.]

If the fact is laid to be done in a city a county in itself, but which are not co-extensive, it must say within the city and county of *E.*, &c. *Rex v. Bunce, P.* 11 *Geo.* 2. *Andr.* 162.]

[*Communis strata, sive alta regia via,* denote the same place and are not uncertain. *Rex v. Hammond, H.* 3 *Geo.* *Str.* 44.]

[The *terminis a quo* and *ad quem* a road leads, is not necessary] *Ibid.*]

[At the parish of *A.* near the highway, and dwelling-houses, is sufficient for a nuisance, without saying in the town or village. *Rex v. White, P.* 30 *Geo.* 2. 1 *B. M.* 333.]

[An indictment against the parish of *B.* for not repairing a road leading from *A.* to *B.* is exclusive of *B.* and therefore bad; and it is not aided by a subsequent allegation that a certain part of the same highway situate in *B.* is in decay, &c. *Rex v. Gamlingay, H.* 30 *Geo.* 3. 3 *T. R.* 513.]

So, the time or place need not be repeated to circumstances. *Mar. pl.* 127. 2 *Rol.* 226.

And it is sufficient, that it be coupled to a time precedent in an indictment for a trespass: as, an indictment for a forcible entry, *quod 1<sup>o</sup> M. intravit & ipsum disseisvit*, without saying, *adtunc & ibidem disseisvit*, is sufficient. *R. 2 Cro.* 41.

If a mortal wound be given, upon which the party dies at another day, the death ought to be alleged at the last day. By



By the *stat. 2 & 3 Ed. 6. 24.* if the stroke be in one county and the death in another, the indictment may be in the county where the death was.

And an accessory in one county to an offence in another, may be indicted where he was accessory.

If a robber in one county fly with the goods into another, he may be indicted of the felony there, but not of the robbery.

(G 3.) *Of the offence. What shall be uncertain.*] So, an indictment ought to shew the certainty of the offence: and therefore, an indictment for murder, or felony, must shew all the circumstances of the fact in certain: as, by whom.

[But if there be any description in the negative, the affirmative of which would be an excuse for the defendant, the proof of it lies on him, and it need not be stated in the indictment. 1 *Sid.* 303. 2 *Hawk. b. 2. c. 25. f. 112.* 5 *T. R.* 84.]

[Thus an indictment, against the defendant as receiver of stolen goods, founded on the *stat. 5 Ann. c. 31.* cannot be exempted to after verdict, because it does not shew that the principal could not be taken so as to be prosecuted and convicted. *Rex v. Pollard, M.* 11 *Geo. 1.* 2 *Ld. Raym.* 1370. *Foster, 373. contra.*]

[Again, in an indictment on the *stat. 22 Geo. 3. c. 58. f. 1.* against a receiver of stolen goods for a misdemeanor, it is not necessary to aver that the principal has not been convicted. *Rex v. Baxter, M.* 33 *Geo. 3.* 5 *T. R.* 83.]

[Charging an officer with a breach of orders, in not prosecuting a war "with all possible vigour and decision," is too uncertain, even tho' the charge be made in the very words of the order given to him. *Rex v. Holland, E.* 34 *Geo. 3.* 5 *T. R.* 607.]

[An indictment on the *stat. 23 Geo. 3. c. 13.* for enticing artificers to go out of the kingdom, &c. charged that the defendant contracted with a manufacturer, &c. to go out of this kingdom of Great Britain into a foreign country called America, such foreign country not then being the dominion of or belonging to the crown of Great Britain: and held good after verdict. *Rex v. Myddleton, T.* 36 *Geo. 3.* 6 *T. R.* 739.]

In what manner committed.

Upon what part the wound was given, upon the face, arm, &c. 4 *Co.* 41. a. *R.* 5 *Co.* 121. b.

And of what depth or breadth the wound was, when there was no amputation. 4 *Co.* 42.

If it says, *quod suffocavit*, &c. *et quâ suffocatione obiit*, without saying, *de quâ*, &c. it is bad. 1 *Roll.* 137.

So, an indictment, *quod dedit plagam circiter pectus*, or, *super brachium*, without saying, *dextrum*, or *sinistrum*, is bad. 4 *Co.* 40. b. *R.* 5 *Co.* 121. b.

So, an indictment for larceny ought to shew the value of the goods, to distinguish grand or petit larceny.

If it be a live thing, it is said *pretii*, if dead, *ad valentiam*.

So, an indictment for an escape, or breaking prison, ought to shew for what crime he was taken, or committed. *St.* 95. a.

For a contempt in not executing a warrant, it ought to shew the nature and tenor of the warrant. *R.* 1 *Vent.* 305.

An indictment for extortion ought to shew in what instance committed. *Mod. Ca.* 32, 3.

What fee was due, or that nothing was due. *R. 3 Leo.* 268.

An indictment for engrossing *magnam quantitatem straminis & feni*, without saying, how much, is bad. *R. Cro. Car.* 381.

So, for erecting *diversa cottagia*. *Show.* 389.

Or, for stopping *quandam partem regia viae, aquae cursus*, &c. *Sho.* 389.

Or, for an assault upon several of the king's subjects, between such a day and such a day. *Per Holt, Sho.* 390.

For saying or publishing such words, *aut similia*. *Bro. Action sur Case*, 112.

[*Calumniatrix, et communis et turbulenta pacis perturbatrix, et lites rixas et pugnas movit et incitavit, et quendam J. A. verbis contumeliis et opprobriis abusa fuit in domo ipsius J. A.* too general. *Rex v. Taylor, M.* 3 *Geo.* 2. *Str.* 849.]

[A common and turbulent brawler, a sower of discord among her quiet and honest neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes amongst his majesty's liege people, *contra pacem*, &c. is too general. None but a barretor and a common scold are indictable by general words. *Rex v. Cooper, H.* 19 *Geo.* 2. *Str.* 1246.]

[And a keeper of a disorderly house. *P Anson v. Stuart, B. R. E.* 27 *Geo.* 3. 1 *T. R.* 754.]

*Quod fabricavit, seu frabricari causavit*, &c. *R. 1 Sal.* 342. 371.

[For a nuisance, that defendant, *sepem levavit vel levari causavit*, ill, for uncertainty. *Rex v. Stoughton, P.* 4 *Geo.* 2. *Str.* 900.]

[Indictment for conveying, or causing to be conveyed, a pauper, is too uncertain; or if it does not say, that he was unable to maintain himself. *Rex v. Flint, P.* 10 *Geo.* 2. *B. R. H.* 370.

*Quod cepit extorsit pro quolibet equo 2d. pro quibussibet 20 ovibus*, &c. *R. 4 Mod.* 103.

So, *quod A. existens servus, sive deputatus took*, &c. is bad. *R. 2 Rol.* 263.

*Quod cum* there was such an order, &c. for it should be positive, that there was. *R. 1 Sal.* 371.

*Quod exoneravit tormentum dans plagam*, without saying, *percussit*. *R. 5 Co.* 122. b.

*Quod nesciens potum fore venenatum bibit*, without saying expressly, *venenum bibit*. *R. 4 Co.* 44. b.

That he refused bail, without saying, that any was offered. *R. Mod. Ca.* 32, 3.

That he made *panes non habentes debitum pondus*, without saying, what is due weight. *R. Sal.* 687.

[Indictment on the *stat.* 33 *Hen.* 8. c. 1. for procuring by false tokens must specify them. *Rex v. Munoz, H.* 13 *Geo.* 2. *Str.* 1127.]

[So, an indictment on the *stat.* 30 *Geo.* 2. c. 24. for obtaining money by false pretences. *Rex v. Mason, T.* 28 *Geo.* 3. 2 *T. R.* 581.]

[These two statutes 33 *Hen.* 8. c. 1. and 30 *Geo.* 2. c. 24. are made in *pari materia*, and whatever has been determined in the construction of one of them, is a sound rule of construction for the other. By *Buller J. ibid.* 586.]

[As to the construction of the *stat.* 30 *Geo.* 2. c. 24. see *Tung v. The King*, in error, *H.* 29 *Geo.* 3. 3 *T. R.* 98.] *Quid*

*Quod exercuit quasdam diabolicas artes, Anglice, witchcraft.* R. Latch, 156.

[*Quia male et negligenter se gessit in executione of the office of constable, too general.* Rex v. Winteringham, Str. 2.]

[So, *de scriptis, bonis et catallis, de D. decipiebant et defraudabant.* Rex v. Powell, Str. 8.]

[So, *diversas quantitates cervisiae.* Rex v. Gibbs, H. 8 G. Str. 497.]

*Quod dixit diversa scandalosa verba* of such a magistrate, without saying, what words. R. 1 Rol. 79.

[As to recitals it must be observed that the word "tenor" has so strict and technical a meaning, as to make it necessary to recite *verbatim*; but the words "in manner and form following, that is to say," require nothing more than a *substantial* recital. Rex v. May, E. 19 Geo. 3. Dougl. 193.]

[Indictment must set out the words spoken of a justice in the execution of his office.]

[If for obstructing him, it must shew by what act. Rex v. How, P. 12 Geo. Str. 699.]

That he took a servant without a testimonial, it ought to shew a former service. Skin. 343.

That he enticed A. from his service, it ought to say, *quod reliquit.* R. Mod. Ca. 99. 101.

That he enticed a servant to take the goods of his master, it ought to say expressly, that he took them. R. Mod. Ca. 289.

So, where an indictment is founded upon a contrivance, a fact in pursuance of it ought to be alleged. 1 Sal. 380.

If there be an indictment for refusal of an office, it ought to shew an election by good authority. 5 Mod. 96.

[If for a *rescous*, it ought to shew the writ, and also the warrant. R. 2 Mod. Ca. 357.]

An indictment *pro contrafact. monetur ad instar pecun. domini regis*, ought to shew, *ad instar* what pieces, viz. groats, shillings, &c.

[In an indictment for carrying a person with the small pox from one parish to another; it must be set forth, that defendant knew the person had the small pox, and that it was with an ill intent. Rex v. Bunce, P. 11 Geo. 2. Andr. 162.]

[On an indictment on 5 El. c. 4. if it is averred, a trade used in Great Britain, instead of England, it is bad. Rex v. Hoteb, T. 9 Geo. Rex v. Parish, T. 12 Geo. Str. 552. Rex v. Lister, M. 1 Geo. 2. Str. 788.]

[*Quod cum* there was such an order, &c. Rex v. Crowherst, P. 10 Geo. 2 Ld. Raym. 1363.]

(G 4.) *And not supplied by innuendo.*] So, words uncertain cannot be supplied by an *innuendo*: as, an indictment for treason for saying, *we have had two wicked kings*, (*innuendo* *Char 1st and Char 2d*;) *if they* (*innuendo* *the people*) *would stand to their principles, we should conquer our enemies*, (*innuendo* *the king and all his loyal subjects*;) is bad; for an *innuendo* cannot determine the sense of the words. R. 3 Mod. 53]

(G 5.) *What is a sufficient certainty.*] But certainty in an indictment to a general intent, is sufficient. Co. L. 303. a. 5 Co. 521. a. [Dougl. 158. Corup. 682.]

And



And therefore, an indictment for felony, *quod cepit bona cujusdam ignoti*, is sufficient. *St. 95. b.*

Or, an horse, &c. of such a value, without mentioning any owner.

*Quod percussit super sinistram partem lateris*, is well: for *latus* is a known part. *R. 2 Cro. 95.*

So, *dans plagam, seu contusionem* is well. *R. Mar. pl. 127.*

*Quod languebat a 15. die ad 16<sup>m</sup>. diem*, without saying, to what hour in the same day. *Mar. pl. 127.*

Indictment *quod fecit libellum ad tenorem & effectum sequentem. R. 1 Sal. 324. 417.*

*Quod fabricavit* a lease with the mark of *B. cujus tenor sequitur*; tho' the mark is not shewn. *R. 1 Sal. 342.*

*Quod fabricavit scriptum obligatorium*; tho' it does not say that it purports to be an obligation. *R. 1 Sal. 342.*

[That *A.* razed out an indorsement on a bank-note, tho' it appears that the words razed out were wrote on the face of the note. *Rex v. Bigg, M. 3 G. Str. 18. 3 P. W. 419.*]

*Quod fecit libellum in quo continetur inter alia, &c. R. Sal. 417.*

*Quod ipse & 20 alii ingrossaverunt*, without saying, *& quilibet eorum ingrossavit*; for they might join. *Cro. Car. 380.*

*Quod recenter recepit felones*; tho' it does not say, that he knew them to be felons. *R. 2 Lev. 208.*

*Quod A. existens* such an officer of such age, &c. *fecit, &c.* without saying *tunc existens*; for where this word relates to the person, and is not collateral, it shall have a general construction. *R. 2 Rol. 226.*

[Indictment against a parishioner for not performing his highway-duty, *A. B.* and *C. D.* being surveyors, is sufficient, without saying by whom or on what day they were appointed. *Rex v. Boyall, T. 32 & 33 G. 2. 2 B. M. 832.*]

[That defendant kept a common, ill-governed, disorderly house, and for his profit unlawfully procured certain ill-disposed persons of ill fame and dishonest conversation, to frequent, and the said persons in the said house to remain, *fighting of cocks, boxing, playing at cudgels, and misbehaving themselves*, is sufficient. *Rex v. Higginson, T. 1 G. 3. 2 B. M. 1232.*]

[An indictment, for a conspiracy to indict for a capital offence, being laid "that the defendants did wickedly and maliciously (omitting the word *falsely*) conspire to indict and cause to be indicted *A. B.* for a crime or offence (omitting to specify *what* crime) liable by the laws of this kingdom to be punished capitally; and that they, according to the conspiracy *aforsaid* between them as *aforsaid* before had, did afterwards *falsely, wickedly, and maliciously indict* him, &c. specifying the very indictment itself, which appears to be a capital crime; is a good indictment, altho' the word *falsely* be not added to the first charge of the conspiring, nor the particular crime there specified; and altho' it be not laid that the said *A. B.* was acquitted of it. *2 B. M. 999.*]

[Where an indictment is brought on a statute which has general prohibitory words, it is sufficient to charge the offence *generally*, in the words of it: and if a *subsequent* statute, or even a clause of exception in the same statute, excuse or except persons particularly circumstanced, out of the general words, such excuse or exception must come by way of plea or evidence; thus an indictment on *5 El. c. 4.*

**f 31.** for exercising the occupation of a tanner without having served an apprenticeship of seven years therein, is sufficient without specifying and averring the want of other qualifications allowed by subsequent statutes; for such other qualifications or exceptions ought to be shewn by the defendant. 2 B. M. 1037.]

[But where the words of a statute are descriptive of the nature of the offence, or the *purview* of the statute, or are necessary to give a summary jurisdiction, the indictment must, in such case, *specify* in its particular words; as, in convictions on the game acts and for swearing, and on the act of 8 & 9 W. 3. c. 26. for the better preventing and counterfeiting the current coin of this kingdom. 2 B. M. 1036.]

That A. knowing B. was indicted for forgery, concealed a witness against him; it is sufficient that B. was indicted. R. F. g. 122. 263.

[So, in an indictment for a libel, the words "of and concerning" are a sufficient introduction of the matter contained in the libel. Rex v. Horne, M. 18 Geo. 3. Cowp. 672.]

So, surplusage does not vitiate an indictment. R. 4 Co. 41. a. R. 5 Co. 121. b. 2 Mod. Ca. 327.

Nor, false Latin: as, *præfata reginæ*. R. 5 Co. 121. b.

[Nor, the omission or addition of a letter that does not change the word, so as to make it another word; as, *undertood*, for understood. Rex v. Buck, M. 15 Geo. 3. Cowp. 229. Dougl. 193. Vide Salk. 660.]

[So, in an indictment for forgery where the party undertook to state the tenor of a bill, and wrote "received" for "receiv'd," all the judges decided that it was not a material variance. *Hart's Case*, 1776, cited by Lord Kenyon Ch. J. *Rolleston v. Smith*, 4 T. R. 166.]

So, inducement to an offence does not require so much certainty: as, in an indictment for an escape, *debito modo commissus*, or, by what authority, is not necessary. R. 1 Vent. 170.

Indictment *quod A. & B. super C. insultum fecerunt*, &c. tho' as to B. it is found *ignoramus*. R. Cro. Car. 464.

So, an indictment need not ascertain more than shews the offence, not that which aggravates it: as, if it be for taking fish out of his pond, it need not name the number or quantity. *Per two J. Twissd. cont.* 1 Lev. 203.

[*Noisome, offensive, and stinking to the common nuisance of all inhabiting and travelling*, is a sufficient charge of the hurtfulness, and of the persons hurt. Rex v. White, P. 30 G. 2. 1 B. M. 333.]

Neither needs there more certainty than the words of the statute import. R. 2 Rol. 226.

If it be for forging a cocket for 5 *sarcinis lini*, it is sufficient. Mo. Ca. 87.

So, *contra formam statuti*, helps any uncertainty not material. 2 Rol. 227.

[In an indictment against a servant of the East India Company for offences in India, it is sufficient to charge him with a wilful breach of duty, without adding it was corrupt. Rex v. Holland, E. 34 Geo. 3. 5 T. R. 607.]

[In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such officer, without shewing his appointment. *Ibid.*]

[Where

[Where an indictment is against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. *Rex v. Holland*, E. 34 Geo. 3. 5 T. R. 607.]

[Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver that he had notice of those acts; he is presumed from his situation to know them. *Ibid.*]

[On an indictment on the *stat.* 17 Geo. 3. c. 26. s. 7. for taking more than 10 s. in the 100 l. for brokerage, it is not necessary to prove that the defendant took the exact sum laid in the indictment, tho' it be not laid under a *scilicet*. *Rex v. Gillham*, E. 35 Geo. 3. 6 T. R. 265.]

[On the trial of such an indictment it must be left to the jury to consider whether the excess above 10 s. in the 100 l. were taken as a fair charge for drawing the writings, &c. or whether it were not so taken with a view of evading the statute. *Ibid.*]

[In an indictment on the *stat.* 37 Geo. 3. c. 70. for the preventing the seducing of persons in his majesty's forces, it is sufficient to state an *endeavour* to seduce, without specifying the means. *Rex v. Fuller*, *Excheq. Cham. M.* 38 Geo. 3. 1 Bos. & Pull. 180.]

[Under a charge that *A.* *advisedly* endeavoured to incite *B.* to mutiny, being a soldier, knowledge of *B.*'s being a soldier is implied; the words *advisedly* in such case being equivalent to *scienter*. *Ibid.*]

[*Semb.* That if one *endeavour* comprise two separate offences, a count in an indictment charging that *endeavour* may contain those two offences. *Ibid.*]

#### (G 6.) Ought to have proper Terms of Law.

So, an indictment ought to make use of terms proper or peculiar to the offence: as, an indictment for treason ought to say, *proditorie*.

And *contra ligeancia sue debitum*. R. 3 Lev. 396. - Ca. Parl. 186. 4 Mod. 165. Skin. 442.

So, an indictment for felony ought to say, *felonice* St. 96. a.

For murder, it ought to have the word, *murdravit*. Dy. 261. a.

Or, *murderavit*. Per Coke, 1 Rol. 137.

For burglary, the word, *burglariter*, or, *burgulariter*. R. 4 Co. 39. b. Vaux.

And *burgaliter* is not sufficient. 4 Co. 39. b. 40. a.

For a rape it ought to have the word, *rapuit*. St. 96. a.

An indictment for barrettry ought to say *communis barrectator*.

For scolding, *communis rixatrix*, for, *calumniatrix* is not sufficient. Mod. Ca. 11.

[In an indictment of a scold, it must be laid *ad commune nocumentum*. *Rex v. Cooper*, H. 19 Geo. 2. Str. 1246.]

[If the indictment say *fabricavit et contrafecit* a bank-note for the payment of 520 l., and the evidence be, that he razed and altered the said note by turning the word two into the word five; this is evidence to support the indictment. Str. 19.]

[*A. B.* being a loose, idle, lewd, and disorderly person—and did charge defendant to detain the said *A. B.* so being a loose, &c. is a sufficient allegation. *Rex v. Bootie*, T. 32 & 33 G. 2. 2 B. M. 864.]

[*Sciens* that, &c. is a sufficient averment. *Rex v. Lawley*, P. 4 G. 2. Str. 904.]

So,



So, an indictment ought to conclude *contra pacem*. R. 2 Cro. 527. Cro. Car. 584. R. per three J. Mod. Ca. 128.

If an offence be in another reign, *contra pacem nuper regis & regis nunc*. R. Yel. 66.

If founded upon a statute, it ought to conclude *contra formam statuti*. R. 1 Sal. 370. R. 2 Rol. 38. Doug. 445.

And, *contra formam statuti*, is bad, where there are several statutes in the case. R. 2 Cro. 142.

And, *contra formam statuti prædicti*, will be bad, where the statute is misrecited. Per Twissd. Ray. 192. Lut. 140.

So, *contra formam statuti*, shall not be rejected, tho' for part it would be good by the common law. R. 4 Leo. 49.

Or, tho' the offence was at the common law, and the statute adds a penalty. Mo. Ca. 17.

But by the st. 37 H. 8. 8. the omission of, *vi & armis*, viz. *gladiis baculis & cultellis*, does not vitiate. R. 2 Lev. 221.

[The words *vi et armis* are not necessary in an indictment for a riot. Rex v. Wynd, P. 2 G. 2. Str. 834.]

So, the omission of *contra pacem*, does not vitiate in an indictment for a nonfeasance. R. 1 Vent. 108. 111. R. 1 Sal. 381.

Or, *contra pacem nuper regis*, where the continuance of the fact is the offence, and the original of it only inducement. R. Yel. 66.

[If the crime is charged to have been committed in the time of the late king, and the indictment concludes against the peace of the present king, it is fatal; the judgment must be reversed. Rex v. Lookup, P. 6 G. 3. 3 B. M. 1901.]

[An indictment lies for maliciously blackening the memory of one who is dead. 5 Co. 125.]

[Yet such an indictment must allege that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, otherwise it cannot be supported. Rex v. Topham, H. 31 Geo. 3. 4 T. R. 126.]

So, *contra formam statuti*, is not necessary where the offence was by the common law, and the statute adds only a penalty, &c. R. 1 Vent. 13. Sal. 460. 1 Sid. 409. Comb. 371. R. 2 Mod. Ca. 11.

And *contra formam statuti nuper editi*, is well, tho' the statute is misrecited; for then the court will take notice of the statute. Ray. 192. Lut. 140.

So, *contra formam statuti*, is not necessary where the offence is a breach of duty, tho' his duty in this particular was prescribed by statute. R. 1 Sal. 381. Per Eyre, Comb. 205.

[An indictment for obstructing the execution of a power granted by statute, lies at common law, and ought not to conclude, *contra formam statuti*. Doug. 441.]

[In an indictment for an offence at common law, a conclusion of *contra formam statuti* may be rejected as surplusage. Rex v. Matthews, H. 33 Geo. 3. 5 T. R. 262.]

So, in an indictment for murder, if there be the word, *murdravit*, *ex malitia præcogitata* is not necessary. Dy. 69. a.

[An indictment for a nuisance ought to conclude, *ad commune nocu-mentum* of all the king's subjects. Str. 688.]

[Facts done by virtue of an act continuing a former one expired, may

may be laid to be done by virtue of the original act. *Rex v. Morgan*, *M. 10 G. 2. Str. 1066.*]

[It must be in the present tense *do*, and not *did* present. *Rex v. Bunce*, *P. 11 G. 2. Andr. 162.*]

### (H) When quashed, if deficient.

**A** Defective indictment may be quashed upon motion.

[The court may use a discretion, either to quash an indictment on motion for insufficiency, or put the defendant to demur to it; but after verdict they are bound to arrest judgment if they see the charge to be insufficient. *2 B. M. 1127.*]

[But they will not quash an indictment on the motion of the prosecutor unless on the ground of insufficiency. *Doug. 240.*]

[An indictment is insufficient, wherever all the facts charged may be true, and yet the party be innocent. *Doug. 153.*]

[*B. R.* will not quash an indictment for a nuisance, but put defendant to demur. *Rex v. Bishop*, *P. 11 G. 2. Andr. 220.*]

[Motion for the prosecutor to quash his own indictment, is not of course, especially if defendant has been put to expence. *Rex v. Webb*, *P. 4 G. 3. 3 B. M. 1468.*]

[If after an indictment removed by *certiorari* is at issue, and jury appointed, prosecutor countermands notice of trial, and defendant chooses to bring it on by proviso, and it stands for trial, and prosecutor in the interim gets a new indictment found and then moves to quash the first, alleging it to be defective, which they had cured by the new, on which they intend to proceed; the court may (by consent) order the first to be quashed, and the other to be put in its place, and to stand in the same condition. *Ibid.*]

Or, a *nolle prosequi* may be entered by the attorney-general. *Mod. Ca. 262.*

[*B. R.* will quash an indictment at quarter sessions for perjury at common law, for want of jurisdiction. *Rex v. Bainton*, *P. 11 G. 2. Rex v. Westinss*, *Str. 1088. Rex v. Fearnly*, *1 T. R. 316.*]

[And where the caption of the indictment stated the court of quarter sessions, where such indictment was found, to have been held on an impossible day, it was fatal. *Ibid.*]

[If a man is indicted for saying to a justice, on being brought before him and another justice, by his warrant, for not paying servants' wages, "you do not do right," and it is not laid, that the words were spoken to him in the execution of his office, the indictment shall be quashed. *Rex v. Leafe*, *T. 11 & 12 G. 2. Andr. 226.*]

[Indictment for maintaining a cottage, without laying four acres of ground thereto, if it says *was presented*, without adding, *on the oaths of 12, &c.* and if it only says, defendant maintained it *for habitation*, without saying *it was inhabited*, shall be quashed. *Rex v. Burkett*, *T. 11 & 12 Geo. 2. Andr. 230.*]

[The court will not quash the indictment for not receiving an apprentice, if it does not appear by the circumstances averred, that it was a binding within *st. 43 El. c. 2.* and *qu. whether indictment lies?* *Rex v. Trevilian*, *P. 20 Geo. 2. Str. 1268.*]

[Indictment against six, jointly and severally, for exercising a trade, may be quashed. *Rex v. Weston*, *P. 11 Geo. Str. 623.*]

[Indictment lies not for setting a person on the footway to deliver printed bills of defendant's occupation, whereby the way was obstructed; and indictment shall be quashed. *Rex v. Sarmon*, H. 31 Geo. 2. 1 B. M. 516.]

[Nor, against a spiritual person, for occupying lands contrary to 21 H. 8. c. 13. the proceedings must be by action or information, and it must be in one of the king's courts, not at sessions. *Rex v. Wright*, P. 31 Geo. 2. 1 B. M. 543.]

But not in an enormous crime: as, for treason or felony; for the court will put the defendant to his demurrer, or plea. *Vide Information*, (D 1, &c.)

[Nor, an indictment for not attending a mayor to execute his warrant, but defendant may demur to it. *Rex v. Bailey*, T. 17 Geo. 2. Str. 1211.]

Nor, an indictment for perjury, or forgery, or subornation. 1 Sal. 372. R. 1 Sid. 54. 1 Vent. 370.

[Nor, indictment against overseers for not paying money over to their successors; for quashing is not *ex debito justitia*, and this is a growing evil. *Rex v. King*, P. 20 Geo. 2. Str. 1268.]

[Nor, indictment for selling flour by false weights, tho' it appears on the face of it that the *flour-scale* was the lighter, which must tend to the prejudice of the seller, and tho' it does not say *where* the selling was. *Rex v. Crookes*, H. 6 Geo. 3. 3 B. M. 1841.]

[Nor, an indictment against several for breaking and entering a mine, and carrying away lead; especially if it is at the time that the judges are trying others in the same county for a like offence. *Rex v. Johnson*, P. 25 Geo. 2. 1 Wilf. 325.]

Or, for extortion. 5 Mod. 13.

Or, for a nuisance. 1 Sal. 372. 1 Vent. 370. without a certificate that it is removed. *Cro. Car.* 584. *Acc. Sal.* 460.

Or, for not repairing an highway, or bridge. 1 Sal. 372. 1 Sid. 140.

Or, for enticing away his servant. 1 Sal. 372.

Or, for throwing down fences contrary to the *st. W.* 2. 4. R. 1 Sal. 372.

Or, for a cheat. R. Mod. Ca. 42.

Or, for a disturbance in church. 1 Sid. 54.

Or, for a forcible entry. Mod. Ca. 96.

So, a motion for quashing shall not be allowed after a recognizance forfeited. 1 Sal. 380.

[The court cannot strike counts out of an indictment, for it is the finding of the grand jury. *Rex v. Peatrefis*, H. 9 Geo. 2. Str. 1026, B. R. H. 203.]

[Motion may be made the last day of term to quash indictment, but not to quash order. 1 B. M. 651.]

### (I) Process upon an Indictment.

BY the *st.* 25 Ed. 3. 14. on an indictment of felony before justices of oyer and terminer, a *capias* shall be awarded to the sheriff, and if he return *non est inventus*, another *capias* returnable at 3 weeks, whereby the sheriff shall be commanded to seize his goods, and if the sheriff



sheriff return *non est inventus*, and the party does not appear, an exigend issues, and the goods are forfeited. *Vide Procefs* (C).

If there be an indictment for a trespass, the process shall be a *venire*, and if the return be that he has sufficient, a *disfringas in infinitum*; if the return be *nichil*, &c. there shall be a *capias*, *alias*, and *pluries*, and an exigend till he appears or is outlawed. *Dalt. ch. 193. Vide the ft. 18 Ed. 3. 5.*

And after outlawry the justices of assise, or of the peace, may issue a *capias utlagatum*, as incident to their authority. *R. 12. Co. 103.*

And tho' the outlawry be afterwards reversed, the indictment stands in force. *Mod. Ca. 115.*

By the *ft. 5 Ed. 3. 11.* justices to hear and determine felony may direct their process against the indicted, into any foreign county.

By the *ft. 1 Ed. 6. 7.* the process shall not be discontinued by a new commission.—So, by the *ft. 11 H. 6. 6.*

By the *ft. 8 H. 6. 10.* if any, indicted for felony, treason, or trespass, dwell in another county, the justice of peace of the county, or franchise, after the first *capias* is returned, may direct another *capias* to the sheriff of the county where the party dwells, returnable in 3 months (if the county court there is held monthly, but if from 6 weeks to 6 weeks, then 4 months) after the *teste*, commanding such sheriff to take him, or, if not to be found, to make proclamation in two counties, before the return of the writ, that he appear before the justices of peace where indicted, at the day of the return of the 2d *capias*, and then, if he appear not, the exigend shall be awarded; but exigend and outlawry otherwise awarded is void.

And by the *ft. 10 H. 6. 6.* if such indictment be removed by *certiorari*, such 2d *capias* shall be made returnable in *B. R.*, &c.

And if the defendant be in the indictment named of a foreign county with an *alias dict.* of the same county, yet process goes according to the *ft. 8 H. 6. 10.* for the *alias dict.* is no part of his name, nor shall he be put to answer to it. *1 Ed. 4. 1.*

And for the same reason, if he be named of the county where the indictment is taken with an *alias dict.* of the other county, he shall not have process upon that statute. *1 Ed. 4. 1.*

By the equity of the said statute, if the indicted be imprisoned in another county, the justices of peace may award an *habeas corpus* to bring him before them.

If a person indicted before justices of peace find surety in *Chancery* to appear at the return of the writ, he shall have a *superfedeas* to such process. *F. N. B. 237. C.*

So, if he find surety before two justices of peace, one *quorum*.

By the *ft. 4 & 5 W. & M. 22. s. 4.* (which continued for 3 years) on exigend in criminal cases before conviction, proclamation shall go to the sheriff of the county where the party dwells, according to the *ft. 31 El. 3.*

And if a *capias* issue upon an indictment for a misdemeanor before a *venire*, it is error. *R. Ray. 375.*

But in treason, or felony, if the process be a *venire* and not a *capias*, it is error. *Semb. 3 Mod. 265. Sho. 75.*

[If the entry is, *ideo veniat inde jurata*, when it should be *praeceptum* *et vicecomiti*, it is error. *Rex v. George, P. 6 Geo. Str. 309.*]

[So, if *venerunt* the jury, in the preterperfect tense, instead of *veniunt* in the present. *Rex v. George*, P. 6 Geo. Str. 309.]

[So, if *quiatam*, &c. is left out in the award of the *venire*, for this is an essential part. *Ibid.*]

[Tho' the indictment be *contra formam stat.* it is not necessary that the *certiorari*, *venire* and *distringas*, express it. *Rex v. Hayes*, T. 3 Geo. 2. Str. 843. *Ld. Raym.* 1518.]

By the *st.* 36 H. 8. 13. and 5 Ed. 6. 11. process of outlawry, on an indictment for high treason against an offender out of the realm, shall be of the same effect as if resistant in the realm. *Vide Utlagary.*

If an indictment be removed into B. R. by *certiorari* out of London, or *Middlesex*, by the course of the court the defendant must give a recognizance to try it within the same term, or at the sittings afterwards. *Mod. Ca.* 246.

[An indictment for felony cannot be removed from *Hicks's-Hall* into the court of B. R. by *certiorari*, without the prosecutor's consent. *Cowp.* 283.]

If it be removed out of another county, the defendant is *sine die*, and, if he does not appear, process goes against him till he is outlawed. *Mod. Ca.* 246.

But now, by the *st.* 5 & 6 W. & M. 2. it shall not be removed by the defendant, unless he give recognizance to try it *ut supra.* *Mod. Ca.* 246

Yet, if it be removed by the prosecutor, it remains at the common law, and the defendant cannot try it without leave of the court. *R. Mod. Ca.* 246.

[Indictment for forging a will, should not be tried pending a suit in the spiritual court touching the validity of it. *Rex v. Rhodes*, T. 12 Geo. Str. 703.]

[If a man is indicted for insulting a justice of the peace in the execution of his office, his recognizance shall not be discharged, tho' the justice dies, but he must plead. *Rex v. Ellers*, T. 21 & 22 Geo. 2. 1 *Wilf.* 222.]

### (K) Confession.

**I**F the defendant appears, or be brought in by process, he shall confess, or traverse the indictment.

If he confesses the indictment, he admits himself guilty.

He may confess in person, or by clerk in court. *Mod. Ca.* 16.

And there shall be judgment against him.

And in an action for the same trespass, his confession shall be evidence against him. 9 H. 6. 60. a.

But where the confession proceeds from fear or ignorance, the judge may refuse the confession. *St. P. C.* 142.

So, a man may *ponere se in gratiam regis*, and pray that he may be admitted by fine. 9 H. 6. 60. a.

And such a confession does not conclude him. 9 H. 6. 60. a.

And he may give affidavits of a first assault, &c. by the prosecutor, for mitigation of the fine. 1 *Sal.* 55.

[Affidavits of consequence of a riot, even tho' relating to a third person, may be read for aggravation of fine, where they are the immediate

mediate consequences, and cannot subsist as a distinct crime by itself; nor where they can, for the defendant might be again indicted for that. *Rex v. Turner, M. 5 Geo. Str. 139.*]

So, after *not guilty* pleaded, *relicta verificatione*, he may confess the indictment. *Kels, 11. Vide Justices, (W 3.)*

So, *protestando quod non est culpabilis*, he may plead a pardon.

So, the attorney-general may enter a *nolle prosequi*. *Mod. Ca. 261.*

But that does not discharge the crime. *R. 1 Sal. 21. Mod. Ca. 261.*

And afterwards there may be other process upon the same indictment. *Per Holt, 1 Sal. 21. Mod. Ca. 261. Vide Justices, (W 3.)*

### (L) Traverse.

**I**F he does not confess, the defendant traverses the indictment, and says, *not guilty*.

Or, *autrefoits convict*, or *acquit*, &c. *Vide Appeal, (G 9. 11.)*

[But another prosecution depending for the same crime cannot be pleaded in abatement, as it may to informations for penalties. *Dougl. 240.*]

But *autrefoits acquit* is no plea, if he was acquitted upon a trial in a mistaken county.

Or, upon an insufficient indictment.

*Autrefoits acquit* in burglary is good, tho' there be a second indictment for the goods of another taken in the same house. *R. Kels, 30. 52.*

But he may be indicted for felony in taking the goods of another. *R. Kels, 30. 52.*

So, he may plead *autrefoits attain* for the same or another felony, unless it be in a case where the party without conviction shall not have restitution, or clergy is allowed in the one, but not in the other felony. *12 Co. 100.*

[*Autrefoits acquit*, or *attain*, on an indictment for murder, is a good bar to an indictment for petit-treason for the same fact; *et vice versa*. *Foster, 329.*]

So, a pardon. *12 Co. 100.*

But a pardon by act of parliament ought to be allowed, tho' it be not claimed.

If he plead in court he shall be committed till trial, except where he gives security to try it at his own charge. *Mod. Ca. 114.*

So, if he plead in the office, the plea ought not to be received without such security. *R. Mod. Ca. 114.*

[On an indictment for a *mayhem* laid *felonice*, the defendant need not to be brought to the bar to plead, but his plea may be delivered in the office. *Rex v. Haddock, M. 12 Geo. 2. Str. 1100.*]

If he be committed, the prosecution shall be at the charge of the prosecutor. *Mod. Ca. 114.*

If the defendant appear upon an indictment for treason, or felony, he ought to plead presently.

So, upon an indictment for a misdemeanor, if he does not appear till a *capias*; for he is in contempt. *Br's Tr. 31.*

Or, if he appear upon the recognizance, tho' he be not in contempt.



Cr, if he appear in his own person, in a case of privilege.

So, if the defendant does not plead till a peremptory rule, he shall give bail to try it in the same term. *Mod. Ca.* 42.

But if he appears upon summons by *venire* or *subpoena*, he shall have an imparlance. *Bp's Tr.* 31.

So, if he plead presently, he need not try it till next term. *Mod. Ca.* 42.

[If defendant pleads a dilatory plea (as *misnomer* of the place where he resides) he must annex an affidavit of the truth of it, or the court will set aside the plea. *Rex v. Grainger*, *H. 5 Geo. 3.* 3 *B. M.* 1617.]

The clerk of the peace shall join issue for the king.

And if the entry be, *et A. B. similiter*, &c. it is sufficient, tho' it does not say, that he was clerk of the peace. *Cro. Car.* 315.

*Vide Justices*, (W 3.)—*Justices of Peace*, (D 13.)

### (M) Arraignment, and Trial.

**A**FTER plea, the defendant shall be brought to his trial. *Vide Justices*, (W 1, &c.)

The proceeding after the indictment, by which the defendant is brought to plead, and afterwards to trial, is called, *the arraignment of the prisoner*.

Justices of peace as well as justices of *B. R.* or gaol-delivery, may arraign a prisoner indicted before them.

If no arraignment be entred, it will be error. *Semb.* 3 *Mod.* 265. *Sbo.* 131.

But if he have *oyer* of the indictment, that imports it. *Semb.* *Sbo.* 131.

After issue upon the indictment, the defendant shall be bound by recognizance to put himself upon his trial.

And if there are two indictments against the same defendant, he shall chuse which shall be tried first, not the king. *Mod. Ca.* 168.

If there be a mis-trial, or variance between the indictment and the record, &c. whereby the trial cannot proceed, or is set aside, the recognizance of the defendant shall be forfeited; for there must be an effectual trial. *R. Mod. Ca.* 168.

If several are indicted for the same offence, there may be a trial against two or three, if the others consent to confess if they are convicted. *Mod. Ca.* 212.

If there are two indictments against a man for the same offence, (as one by the coroner's inquest, the other by the grand inquest,) the usual course is to try him upon both at the same time. 1 *Sal.* 382.

Or, if he be tried upon one, tho' acquitted, he must be tried upon the other, and plead the former acquittal. *R.* 1 *Sal.* 382.

If it appear to be only a trespass, he shall be found *not guilty*; for it cannot be found specially, and a fine for the trespass. *R. Kely.* 29.

The indictment shall be read to the prisoner in *English*, or a tongue which he understands, before he pleads. *R.* 1 *Sid.* 85.

By the *st.* 22 *H. 8.* 14. a felon may challenge 20 of the jury peremptorily. *Vide Challenge*, (C 1.)

And for cause, all that he pleases; as, that a juror is infamous.

Or, had not 40s. *per annum*.

Or, had not goods to the value of 40*l.* if it be in a borough, according to the *st.* 23 *H. 8.* 13. Or,

Or, was one of his indictors : by the *st.* 25 *Ed.* 3. 3.

[In an indictment where the punishment may be infamous, the king may not withdraw a juror. *Rex v. Jeffs*, *T.* 7 *Geo.* 2. *Str.* 984.]

[If a man is indicted for petit treason, he may be found guilty of murder. *Swan and Jeffery's Case*, 1752, *Foster*, 104.]

[If *A.* be indicted for petit treason, and *B.* for murder, and they do not challenge, they may be tried together ; if they insist on their challenges, they must be tried separately, for the number of peremptory challenges is different. *Ibid.*]

[Whether a man indicted for murder, when it ought to have been for petit-treason, can be found guilty ? *Qu. Foster*, 327.]

[In cases of infancy, and insanity, and in all cases of justifiable homicide, the jury, under the direction of the court, may find a general verdict of acquittal. *Foster*, 279.]

[So, in homicide by misadventure. *Foster*, 280.]

*Vide Justices*, (W 1, &c.)—*Justices of Peace*, (D 14.)

### (N) Judgment.

**I**F the defendant be convicted upon an indictment by confession or verdict, there shall be judgment against him according to the nature of the offence.

[It is not necessary that on an indictment for nuisance there be always judgment that it be abated, if it be a transitory nuisance, as dressing skins. *Rex v. Pappineau*, *H.* 12 *Geo.* *Str.* 686.]

[On an indictment for a nuisance in erecting a wall across a road (not for continuing the nuisance) it is not necessary to adjudge that the nuisance be abated. *Semb. Rex v. West Riding of Yorkshire*, *H.* 38 *G.* 3. 7 *T. R.* 467. *Rex v. Stead*, *H.* 39 *Geo.* 3. 8 *T. R.* 142.]

[Secus, where it is stated in the indictment as an existing nuisance. *Ibid.*]

If the defendant be fined, it may be imposed when he is absent ; for a *capias pro fine* lies. 1 *Sal.* 56.

But judgment for a corporal punishment cannot be given in the absence of the defendant. 1 *Sal.* 56.

Tho' he be outlawed, *R.* 1 *Sal.* 400.

So, execution for a felony cannot be awarded against any one absent, tho' he be outlawed. 1 *Sal.* 400.

[The defendant need not be in court on arguing a special verdict, as he must on a motion in arrest of judgment ; *Rex v. Hayes*, *T.* 3 *G.* 2. *Str.* 843. or as he must on moving for a new trial ; *Rex v. Gibson*, *P.* 7 *G.* 2. *Str.* 968. or upon an argument on an indictment removed by *certiorari*, where defendant is found guilty of a conspiracy, but also found that the other conspirator is dead. *Rex v. Niccolls*, *P.* 18 *G.* 2. *Str.* 1227.]

[On motion for arrest of judgment, after conviction for a conspiracy to charge one with a capital felony, defendant must be personally present in court. *Rex v. Spragg*, *H.* 33 *Geo.* 2. 2 *B. M.* 930.]

[If husband and wife are convicted of keeping disorderly house, there may be judgment against the wife tho' the husband is absent. *Rex v. Thomas*, *T.* 9 *Geo.* 2. *B. R. H.* 278.]

[The usual judgment is, pillory ; but the court is not tied down to any particular punishment for a misdemeanor. *Ibid.*]

[A person convicted of concealing naval stores may be sentenced to pay the penalty of 200*l.* or to be corporally punished at the election of the court. *Rex v. Bland*, M. 34 Geo. 3. 5 T. R. 370.]

[If judgment against defendant, found guilty of insulting a justice of peace in execution of his office, is imprisonment for a month, to ask pardon of the justice at his house, and to advertise it in newspaper; only the imprisonment is legal, the rest void; and when the imprisonment is executed, defendant shall be discharged on *habeas corpus*. *Rex v. Collier*, T. 25 & 26 Geo. 2. 1 Wilf. 332.]

Nor, can it be awarded, but in the county where he was attainted. *Semb.* 3 Mod. 124.

So, judgment ought not to be without a demand, *si quid dicere habeat quare judicium non*, &c. *Semb.* 3 Mod. 265. R. Sho. 132.

And the prisoner shall not tender any matter for stay of judgment, but what arises upon the indictment. 1 Sid. 85.

[If the words *adunc et ibidem* are left out as to swearing of the jury, judgment shall be arrested. *Rex v. Morris*, P. 4 Geo. 2. Str. 901.]

[Judgment obtained by surprise for want of plea, shall not be set aside. *Semb.* *Rex v. Mayors*, P. 11 Geo. 2. Andr. 209. *Sed qu.*]

[Judgment regularly obtained in a criminal cause is never set aside. *Rex v. Hunter*, P. 20 Geo. 2. 1 Wilf. 163.]

[Motion in arrest of judgment (on the crown-side) may be made at any time before sentence pronounced; for the judgment signed in the office is only interlocutory, and the award *quod capiatur*, only to bring defendant in to receive the final judgment. *Rex v. Robinson*, T. 32 & 33 Geo. 2. 2 B. M. 799.]

After judgment given, the court may vary it the same term. 1 Sal. 401. *Vide Record* (F).

An indictment in B. R. shall be entered upon the plea roll. 1 Sal. 371.

And if an offence appears in the indictment, for which it may be maintained, it is sufficient, tho' in other parts it is bad; for here the court sets the fine in proportion to the offence found, and it is not like declarations where entire damages are found, which the court cannot apportion to the good part of the declaration. R. 1 Sal. 384, 5.

[A man indicted for a robbery from the person, cannot on that indictment be found guilty of larceny. *Rex v. Francis*, P. 8 Geo. 2. B. R. H. 113. Str. 1015.]

[In all cases, where the indictment does not well charge a felony nor the special verdict *certainly* find any on the facts therein stated, or where the prisoner demurs, which is allowed, or where, on a general verdict of guilty, judgment is arrested for defects in indictment, judgment of acquittal must be given; and this will be no bar to another indictment, constituting another offence. *Rex v. Burridge*, M. 1735, 3 P. W. 439.]

[No regard should be had to a representation by jurymen after their departure from the bar, contrary to what they have found on oath. *Rex v. Thirkell*, T. 5 Geo. 3. 3 B. M. 1696.]

[After sentence for perjury, the court will not let in a motion for arrest of judgment for a mistake in the indictment. *Rex v. Lockup*, P. 6 Geo. 3. 3 B. M. 1901.]

*Vide Justices of Peace*, (D 15.)

As



As to error upon an indictment, *vide Error* (B).

For more concerning *Indictment*, *vide Action upon the Case for a Conspiracy*, (C 4.)—*Action upon the Case for a Nuisance*, (D 3.)—*Amendment*, (2 C 1.)—*Appeal*, (G 16.)—*Barretry* (C).—*Battery*, (E 2.)—*Forcible Entry*, (D 3, 4.)—*Forgery*, (B 2.)—*Justices of Peace*, (B 104, 105.—D 12.)—*Officer*, (G 11.)—*Parliament*, (L 13.)—*Rescous*, (D 3.)

INDORSEMENT.

*Vide Fait*, (E 2.)

INDUCEMENT.

*Vide Pleader*, (C 31. 43. 82.—E 10.—G 14. 20, 21.—O 15.)

INDUCTION.

*Vide Esglise* (L).

INFANT.

*Vide Infant*—*Administration* (E—F).—*Voucher*, (D 2.)

INFORMATION.

(A) When it lies.

(A 1.) By the Attorney-General.

**A**N information is a declaration of the charge, or offence against any one at the suit of the king. *Terms de Ley, verb. Information.*

The king may proceed against any one for an offence under the degree of treason, or felony, not only by indictment or presentment, but also by information upon record. *R. Sho. 107, &c. 5 Mod. 459.*

And that, not only in the *Exchequer*, but also in *B. R.* and other courts. *Sho. 109, 110.*

In *C. B.* where a statute gives an information in any court of record. *R. 3 Leo. 48.*

An information may be brought by the attorney-general, *ex officio*, or by a common informer. *Vide the st. 21 Jac. 4.*

The entry of an information by the attorney-general in *B. R.* is, *memorandum quod T. T. miles attornatus domini regis nunc generalis qui pro eodem domino rege in hac parte sequitur in propria persona sua venit hic in curiam dicti domini regis coram ipso rege apud Westmonasterium die S. proximo post, &c. Et pro eodem domino rege dat curiam hic intelligere & informari quod, &c. Clift, 395.*

For the *Exchequer*, *vide Co. Ent. 372. 376. 378. 381. 384. 387. 390.*

But

But an information by a common informer, and also by the attorney-general, ought to be in the proper county. 3 *Inst.* 193. 4 *Inst.* 172. *Adm. Cro. Car.* 112. *Per two J. Cro. El.* 737. *Vide Action*, (N 10.)

So, by the *st.* 21 *Jac.* 4. information shall not be by the attorney-general, or any other, in the courts of *Westminster*, for an offence for which a common informer might have an information before justices of assize, *nisi prius*, gaol-delivery, *oyer* and *terminer*, or justices of peace at the quarter sessions. 4 *Inst.* 172. 174. *Vide Action upon Statute* (D).

Tho' it be for offences mentioned in the proviso. 4 *Inst.* 174.

So, debt shall not be brought in *B. R.*, &c. for the penalty of any offence within the *st.* 21 *Jac.* 4. if the offence was not in *Middlesex*. *R. cont.* 1 *Vent.* 8. 1 *Sid.* 400. *R. acc. per Holt, and all the judges*, —*W.* 3. *Vide* 1 *Sal.* 372, 3.

But this *st.* 21 *Jac.* 4. extends only to offences inquirable before justices of *nisi prius*, assize, gaol-delivery, *oyer* and *terminer*, or of the peace. *R. Cro. Car.* 112.

By the *st.* 31 *El.* 5. an information, where a penalty is given to the queen, shall be brought in two years after the offence; if to the queen and the prosecutor (unless on the statute of tillage) in two years after the year allowed to the common informer; or, if the statute limits a shorter time, then sooner. *Vide post.* (A 3.)

And if there be a penalty to the king and the informer, and the common informer does not sue within the year, the king within two years afterwards shall sue for the whole forfeiture. *Mod. Ca.* 220.

Yet if *B.* brings an action upon the *st.* 23 *H.* 6. for the penalty of 40*l.* for a false return of a burgess to serve in parliament, (the burgess himself not suing within three months,) he shall not be reputed a common informer. *R.* 4 *Mod.* 130. *Sho.* 354. 3 *Sal.* 200.

So, upon the *st.* of tillage 5 *El.* 2. the informer ought not to sue within three years; for the first year is given to him in remainder, the second year to the second in remainder, the third to him in the reversion, and then the informer (any more than the king) is not restrained to any time. *Sav.* 6.

[It lies against one for unshipping, &c. tho' another is in execution on a judgment for the same offence. *Attorney-General v. Popplestone*, *M.* 1731, *Bunb.* 311.]

(A 2.) *Ex officio.*

So, an information may be exhibited *ex officio* by the master of the crown office, as coroner and *attornatus domini regis*. *Clift*, 395. *R. Sho.* 106.

But the clerk of the crown ought not to set his hand to an information, without examining the cause. *Sti. Pr. R.* 270.

And the court will not compel him to file it. *Ray.* 482.

And now, by the *st.* 4 & 5 *W. & M.* 18. the clerk of the crown shall not, without express order by the court, exhibit, receive, or file an information, &c. before he have a recognizance from the person procuring it, to him against whom it is, in 20*l.* penalty to prosecute effectually, and abide such orders as the court shall direct.

[Before this statute it was in the power of any individual to file  
an

an information without disclosing to the court the grounds on which it was exhibited. 4 T. R. 290.]

Which recognizance the clerk of the crown, or any justice of the peace, where the cause of the information arises, may take, and when taken or brought to the office shall be entered on record, and a memorandum of it filed in an open place of the office, to which all may resort without fee.

And if the defendant plead to issue, and the prosecutor do not at his own costs try it within a year, or procure a *nolle prosequi*, or a verdict be against him, B. R. shall award the defendant costs, unless the judge at the trial in open court certify on record, that there was a reasonable cause for the information; for which costs, if not paid in three months, the defendant shall have the benefit of the said recognizance.

By the same statute, it is declared, that it shall extend only to informations by the master of the crown office.

[The meaning of stat. 4 & 5 W. & M. c. 18. is, that the clerk of the crown shall file no information without leave, nor issue process thereupon without recognizance. *Rex v. Howell*, P. 9 G. 2. B. R. H. 247.]

And this statute extends to an information by the coroner for any misdemeanor; as, to an information in nature of a *quo warranta*. R. 1 Sal. 376. Carth. 504.

And if any information be filed before a recognizance given, the whole process upon it shall be quashed. R. 1 Sal. 376. Carth. 504.

And after recognizance, the costs shall be paid, if the judge does not certify, &c. which shall be intended of a certificate entered upon the *posse*. Per Holt, Comb. 345.

[Tho' the acquittal of the defendant be against evidence, and contrary to the direction of the judge, yet if the judge do not, at the trial certify there was probable cause, the defendant shall have his costs, for it is not discretionary but compulsory on the court. Str. 1131.]

[The court never grants information (on a penal statute) where the penalty vests in the crown only; the attorney-general must file it. *Rex v. Hendricks*, T. 18 Geo. 2. Str. 1234.]

[Therefore if the suit on a penal statute, as on 12 Ann. c. 16. for usury, is lapsed by time to the crown, the court will not grant information. *Ibid.*]

[Service of a rule to shew cause why, &c. at the house of defendant is good unless it appears that he is abroad. *Rex v. Badouin*, T. 9 G. 2. Str. 1044. B. R. H. 271.]

[If five rules are obtained for informations against five several defendants, one joint information cannot be filed against them on these rules, tho' it is for a joint offence. *Rex v. Heydon*, H. 2 G. 3. 3 B. M. 1270.]

#### (A 3.) By a common Informer.

By the st. 18 El. 5. none shall sue on a penal statute but by information, or original. *Vide Action upon Statute*, (E 1, 2.) *Vide Action by qui tam*, &c.

And therefore an action upon a penal statute in B. R. by bill is error. R. Cro. El. 77.

And



And is not aided by the *st.* 18 *El.* 14. which was made for the reformation of jeofails. *R. Cro. El.* 77.

So, where a statute gives a penalty to the king and to him who will sue for it; if the king has not exhibited an information, any common informer may.

And the king afterwards cannot restrain him of moiety of the penalty. *Sti. Pr. R.* 270.

[And the king may sue for the whole where a *qui tam* suit has not been commenced. *Rex v. Hymen, E.* 38 *Geo.* 3. 7 *T. R.* 536.]

[In such a case the king may recover the penalty by an information filed by the attorney-general in *B. R.* *Ibid.*]

And if there be an information *qui tam*, &c. tho' the attorney-general enters a *nolle prosequi*, the informer may proceed for his part. *R. 1 Leo.* 119. *Cro. El.* 583.

So, if the king pardon. *Cro. El.* 583.

Otherwise, in an information upon the *st.* 16 *R.* 2. for a *præmunire*, by the attorney-general and the informer; for there the informer only sues for damages which are only accessory to the conviction. *R. 3 Leo.* 139.

So, if the informer dies, the attorney-general may proceed for the king's part. *R. Cro. El.* 583.

Or, if he release, or will be nonsuited. *Cro. El.* 583.

Or, if the informer lapse his year. *Sav.* 6.

[If the informer dies pending the information, the court will give leave to make a re-seizure. *Holden v. Broad, in Sc. H.* 1719, *Banb.* 56.]

But by the *st.* 18 *El.* 5. the informer shall exhibit the information in person, and pursue by himself or attorney, and not by deputy.

So, by the same statute, on an information, the officer, who receives it, shall make a note of the day, month, and year when exhibited, from which time it shall be accounted of record, and not before: but this extends not to informations for maintenance, champerty, buying of titles, or embracery, or by a corporation, or other to whom a penalty is specially given, or by officers who proceed *ex officio*, or for matters concerning their offices.

By the *st.* 31 *El.* 5. an information shall be by a common informer within one year after the offence, (unless on the statute of tillage,) or if limited by a statute to a shorter time, then sooner. *Vide ante*, (A 1.)

By the *st.* 31 *El.* 5. and 21 *Jac.* 4. the information shall lay the offence in the proper county, and if not proved, the defendant shall be found not guilty; and shall not be in the courts at *Westminster*, where the information may be before justices of assize, *nisi prius*, &c. *Vide ante*, (A 1.)—*Action*, (N 10.)

[But where a statute limits suits by an informer *qui tam*, to other courts, yet any one may, by construction of law, exhibit an information in the *Exchequer*, for the whole penalty for the use of the king. 2 *And.* 127, 128. *C. Jac.* 178, 179. cited 2 *Hawk.* 381.]

And by the *st.* 21 *Jac.* 4. shall not be received, till the informer swear he believes the offence committed within a year in the same county; which oath shall be entred on record.

But the oath of the informer need not appear upon the information. *R. Cro. Car.* 316.

By

By the *ſt.* 18 *El.* 5. if the informer make compoſition with the defendant before or after proceſs, or before or after plea, or take money of him without order of court, or offend in ſuing out proceſs, or by other miſdemeanor, he ſhall be ſet in the pillory, be ever diſabled to be an informer, and forfeit 10 *l.*, a moiety to the queen, a moiety to the party grieved; of which offences juſtices of *oyer* and *terminer*, of aſſiſe, and of the peace at quarter ſeſſions, may inquire, &c.

By the *ſt.* 31 *El.* 5. none, for a miſdemeanor prohibited to be an informer by order of court, ſhall after be admitted to inform on any penal ſtatute, unleſs he be the party grieved.

If an informer compound an information at the quarter ſeſſions, he ſhall be indicted for it, as an offence within the *ſt.* 18 *El.* 5. *Adm.* 1 *Sid.* 311.

Tho' the ſeſſions have not conſuſance of the offence for which the information is exhibited. *Semb.* 1 *Sid.* 311.

By the *ſt.* 18 *El.* 5. if the informer delay or diſcontinue the ſuit, be nonſuit, or have a verdict againſt him, he ſhall pay coſts; for which the defendant may have a *capias*, *fieri facias*, or *elegit*. *Vide Coſts*, (A 6.)

But the court will not oblige him to give ſecurity for coſts. *R.* 2 *Bul.* 18.

Nor, grant an information, where an indictment is found for the ſame offence, tho' inſufficient. 2 *Mod. Ca.* 187.

[Several ſeiſures by ſeveral perſons, not amounting to 100 *l.* may be put into one information. *Qui tam v. Jackſon*, in *Sc. P.* 1720, *Bunb.* 63.]

[On an information *qui tam*, &c. the attorney-general may withdraw a juror. *Semb.*; *ſed. qu. Anon. M.* 1726, *Bunb.* 220.]

## (B) For what Offences it lies.

AN information lies by the common law for every crime, which tends to the ſubverſion of the ſtate: as, for blaſphemous words; for religion is the cement of ſociety. *R.* 1 *Vent.* 293.

[For blaſphemy; and the court will not ſuffer it to be debated, whether writing againſt Chriſtianity in general is not puniſhable at common law.]

*N. B.* This does not include diſputes between learned men on controverted points. *Rex v. Woolaſton*, *P.* 2 *G.* 2. *Str.* 834.]

[For printing and publiſhing an obſcene book. *Rex v. Curl*, *M.* 1 *G.* 2. *Str.* 788.]

[For printing in a newspaper, that *A.* a juſtice of peace "was ſcandalouſly guilty of telling a lie in divers companies," viz. that defendant had aſked his pardon for publiſhing that *A.* was to be married to *W.*; for giving the lie tends to breach of peace. *Rex v. Staples*, *T.* 11 & 12 *Geo.* 2. *Andr.* 228.]

For words which juſtify the murder of *Charles* the 1ſt, in contempt of *W.* 3. tho' *Charles* the 1ſt was dead before. 3 *Sal.* 198.

[For bribing perſons, either by money or promiſes, to vote at elections of mayors, &c. of corporations. *Rex v. Plympton*, *M.* 11 *G.* 2 *Ld. Raym.* 1377.]

So, an information lies, where a man omits a thing, which ſome ſtatute

statute commands to be done, or does any thing prohibited by statute. 2 *Mod.* 302.

[If a captain of a man of war, refuses to let the coroner come aboard his ship lying in the body of the county (as in *Portsmouth* harbour) to take an inquisition of one who had hanged himself there, information shall be granted. *Rex v. Soleguard*, T. 11 & 12 G. 2. *Andr.* 231. *Str.* 1097.]

So, if by one clause a statute prohibits a thing, and by another clause gives a penalty; an information lies, upon the prohibitory clause. *Per Hale*, 2 *Mod.* 128.

So, if a statute makes a thing criminal which was lawful before, an information lies for an attempt to do it: as, where going to *France* during a war, without licence, is made high treason by the *st.* — *W.* 3. An attempt to go to *France* is a great misdemeanor, for which an information lies. *R.* *Skin.* 637.

So, if an officer neglects, or abuses his authority.

As, if a justice of peace commits to the house of correction, without proper cause. 2 *Mod. Ca.* 45.

[If a justice of peace, without whom the sessions could not be held, voluntarily absents himself. *Rex v. Fox*, H. 3 G. *Str.* 21.]

[If a justice refuses to put the act 1 G. c. 13. for taking the oaths, in execution, on application made to him. *Rex v. Newton*, H. 7 G. *Str.* 413.]

[If justices hold a petty sessions to search for vagrants, and one confesses himself settled at *A.* and they remove him thither, and he returns the same day, and one of the justices present at the sessions, without summons or oath, commits him, the court will grant information. *Rex v. Angell*, T. 8 G. 2. *B. R. H.* 124.]

[If one justice takes an examination, in order to make out an order of removal, and it is not said in the complaint, that the party is likely to become chargeable, information shall be granted. *Rex v. Wykes*, T. 11 & 12 G. 2. *Andr.* 238.]

[If two justices, who did not take the examination, make an order of removal, reciting, that complaint has been made, and examination taken on oath *before us*, &c. and if they do not summon him, information shall be granted. *Ibid.*]

[If a justice issues a warrant to apprehend a person for nonpayment of servant's wages, without a previous oath, (for the proper way is to summon,) and it appears that the justice acts oppressively in other instances, information lies. *Rex v. Soane*, T. 11 & 12 G. 2. *Andr.* 272.]

[But the court will not hear a motion against a justice for convicting without summons, till the conviction is removed. *Rex v. Heber*, M. 5 G. 2. *Str.* 915.]

[It lies for a libel in a letter to a mayor, "I am sure you will not be persuaded from doing justice, by any little arts of your town-clerk, whose consummate malice against me and my family will make him do any thing, be it ever so vile." *Rex v. Waite*, T. 16 Geo. 2. *Wilf.* 22.]

[It lies for publishing two distinct libels on two distinct persons, by singing two songs at a man's door, one a libel on his son, the other on his daughter, to discredit and disturb him and them. *Rex v. Benfield*, P. 33 G. 2. 2 *B. M.* 980.]

[And



[And against several persons, who join in one joint act, as thus singing, whether one or two songs, or first and second part, or separate stanzas; it is one entire offence, and they may be joined in one information or indictment. *Rex v. Benfield*, P. 33 G. 2. 2 B. M. 980.]

[If one of the songs is libellous, and the other not, yet it will only go to lessen punishment, not to arrest judgment. *Ibid.*]

[It lies against the judges of an inferior court, for unduly discharging a debtor out of their prison. Attachment also lies, for it is a contempt. *Per Hardwicke C J. Moravia's Case*, T. 8 G. 2. B. R. H. 135.]

[Information lies for keeping great quantities of gunpowder, as for a nuisance. *Rex v. Taylor*, T. 15 G. 2. Str. 1167.]

[Against an attorney employed to take up by judge's warrant one outlawed for forgery, for letting him go for 200 l. after he was in tipstaff's custody. *Vaughan* was fined 500 l. and imprisoned for six months for this. *Rex v. Vaughan*, T. 16 G. 2. Wilf. 22.]

[A., a girl, is put apprentice to B. a music-master, by her father, who is bound in 200 l. for performance of covenants; A. is debauched by C., B. afterwards discharges the indenture, and releases the penalty to the father, and gives her up to C. without the father's knowledge, who pays him the penalty of 200 l. and gives bond that B. shall have the profits of A.'s singing that year. A. is indentured to C. a gentleman, to learn music of him, and covenants, *inter alia*, "not to quit his apartment." The articles are executed by all but the father; bond from him for A.'s performance of covenants is drawn, but not executed, and she goes and lives with C. as a kept mistress; information lies against B., C., and D., the attorney who drew the instruments, and was privy to the whole, for a conspiracy. *Rex v. Delaval, or Miss Catley's Case*, T. 3 G. 3. 3 B. M. 1434.]

[An information lies for contriving to get a young lady out of the custody of her guardian assigned in Chancery, and marrying her, tho' she voluntarily went into a coach prepared for the purpose of carrying her off. Str. 1107.]

[For one single act in usurping an office, an information lies at law, for punishment of the offender, but not on 9 Ann. c. 20. which entitles to costs, and relates only to franchises affecting rights between party and party. *Rex v. Williams*, M. 31 G. 2. 1 B. M. 402.]

### (C) For what, not.

**BUT** where a statute does not only make a prohibition, but also makes a nullity in the act intended to be restrained, no information is necessary; as, where the *stat. 18 H. 6. 11.* prohibits any to be a justice of peace, who has not 40 l. *per annum*, &c. an information is not necessary; for the statute makes an incapacity, and his office is void. 2 Mod. 302.

So, upon the *stat. 5 & 6 Ed. 6. 16.* which prohibits the sale of offices; for the office is *ipso facto* void. 2 Mod. 302.

[For facts committed on the high seas; for information is local. *Rex v. Baxter*, M. 5 G. 2. Str. 918.]

[For not collecting money on a brief for fire; because it is of a private nature, and a penalty is given and a method of enforcing it. *Rex v. Ford*, P. 13 G. 2. Strange, 1130.]

[No,

[Nor, for perjury in the oath against simony, before conviction of the simony. *Str.* 70.]

[An information for a libel will not be granted, if the contents be true, but the party will be left to his remedy before a grand jury. *Str.* 498. *Dougl.* 284. 387.]

[For striking the mayor of a town in the execution of his office, if the mayor struck first. *Rex v. Symonds*, P. 9 G. 2. B. R. H. 240.]

[On *stat.* 1 J. 1. c. 22. concerning leather-cutters; for the proceedings must be by indictment.]

[The 50th section of the statute giving the jurisdiction to the sessions, &c. where an information does not lie. 1 B. M. 390.]

[No information lies for usury after the year for the common informer elapsed, unless by the attorney-general who may file it *ex officio*. *Str.* 1233.]

### (D) Form of Proceeding.

#### (D 1.) Process.

[THE court will grant a rule *nisi* for a criminal information at the end of a term against a magistrate for malpractices during the term, but not for any misconduct before the term. *Rex v. Smith*, M. 37 Geo. 3. 7 T. R. 80.]

[The affidavits on which an information is moved for, have no title, the affidavits on shewing cause are intitled, The King against A. (the defendant). *Rex v. Jones*, T. 12 G. Str. 704. *Rex v. Peirson*, H. 12 Geo. 2. Andr. 313.]

[Where a submission to an award is made a rule of court under the statute, there being no action, the affidavit on which to apply for an attachment for disobeying the award need not be intitled in any cause, but the affidavits in answer must. *Bevan v. Bevan*, B. R. E. 30 G. 3. 3 T. R. 601.]

[The affidavits produced on shewing cause against a rule for a criminal information need not be intitled. *Rex v. Harrison*, M. 35 G. 3. 6 T. R. 60.]

[The defendant, who had been arrested in an action for penalties under the lottery act, was discharged on common bail, because the affidavit to hold to bail was intitled, there being no cause then in court. *Rex v. Cole*, E. 36 Geo. 3. 6 T. R. 640.]

[The court refused to discharge a defendant out of custody, on the ground that the affidavit on which he had been holden to bail was intitled in the cause. *Clarke v. Cawthorne*, B. R. T. 37 G. 3. 7 T. R. 321. *Vide Bail*, (K 4).]

[The court of B. R. will grant an information on such evidence alone as would support a bill of indictment; they consider themselves as placed in the room of a grand jury. *Rex v. Willett*, E. 35 G. 3. 6 T. R. 294.]

[An affidavit by A. stating that B. had brought him a challenge from C., and that B. had refused to make an affidavit that C. sent him with it, is not evidence on which the court of B. R. will grant a rule *nisi* for a criminal information against C. for sending a challenge. *Ibid.*]

By the *st.* 21 Jac. 4. the same process shall be in an information, as in trespass at common law. And

And therefore, process lies to an outlawry. 4 *Inst.* 172.

Yet upon an outlawry, the defendant cannot be fined; for an outlawry for a misdemeanor does not amount to a conviction for the offence. *R. Sal.* 494.

So, process to an outlawry is intended by the *st.* 21 *Jac.* 4. in popular actions, or informations before justices of assize, *oyer and terminer*, peace, &c. 4 *Inst.* 172.

So, upon an information in *B. R.* or *C. B.* a *subpoena* lies. 3 *Leo.* 48. *Co. Ent.* 370. *R.* 1 *And.* 48.

So, upon an information in the *Exchequer* a *subpoena* lies, and afterwards an attachment, proclamation, commission of rebellion, and upon motion a serjeant at arms, with the same costs for a contempt as upon an *English* bill. *Rules and Orders in the Exchequer*, Rule 51.

But by the *st.* 18 *El.* 5. no process shall go till an information exhibited (unless in informations for champerty, maintenance, &c.).

And the clerk shall indorse on it the name of the prosecutor, and the penal statute, on pain of 40 s., a moiety to the queen, a moiety to the party.

And by the *st.* 4 & 5 *W. & M.* 18. all outlawries on informations, except for treason, or felony, may be reversed by attorney, and without giving bail, unless when it is specially ordered by the court.

By *Rules and Orders in Exchequer*, Rule 48. in an information in the *Exchequer* upon seizure, &c. a short note of the names of the parties, the quality of the goods seized, and the day in which the information was exhibited, shall be entered in a book of the clerk of the office, to be prepared for such intent.

So, in an information upon a penal statute, there shall be an entry of the names of the parties, and the day of the information. *Rules and Orders in the Exchequer*, Rule 48.

(D 2.) The Information ought to be certain.

An information ought to be certain: and therefore, if an information upon the *st.* 18 *H.* 6. 17. for selling a pipe of wine, which does not contain 126 gallons, without a defalcation of the price for the defect in the measure, does not shew how much the defect was, viz. a pint, quart, &c. it is not good. *R.* 2 *Leo.* 39. *Vide Indictment*, (G 1, &c.)

If an information against a ferryman for extortion be, that he took so much *de quibusdam ignotis* between such a day and such a day, *pro quolibet equo*, without shewing the certainty of what he carried, and at what time, it is bad. *R.* 4 *Msd.* 102. *Sho.* 389. 3 *Sal.* 192. 201.

If an information for a false indorsement of *Exchequer* bills says, *quod falso indorsavit quasi recepta essent pro custumis*, it is bad; for it does not shew what was indorsed. *R.* 1 *Sal.* 375.

[If an information for landing brandies, duty unpaid, be laid *ante exhib. huj. informat.* it is good, without saying, between such a day, and before exhibiting. *Read v. Francis*, in *Sc. P.* 1719, *Bunb.* 42.]

[On an information against two for a conspiracy to accuse one of an attempt to commit sodomy, *conatus est*, is sufficient. *Rex v. Kinnersley*, *T.* 5 *G. Str.* 193.]

[The affirmation of the conspirators is a sufficient overt-act. *Ibid.*]

[No overt-act is necessary. *Ibid.*]



[It is not necessary to aver the innocence of the accused; that the defendant did *falsely* charge is sufficient. *Rex v. Kinnerley*, T. 5 Geo. Str. 193.]

(D 3.) Ought to allege the Offence according to the Words of the Statute, &c.

So, an information ought to allege the offence committed according to the words of the act, which are not supplied by the words, *contra formam statuti*: as, an information for importing goods of a foreign growth in a foreign ship, *contra formam statuti*, is not good, unless it says, that the goods *belong to the importer*, for then they are not forfeited. *R. Hard.* 20.

[On an information on 5 G. for importing brandy in a collier, *contra formam stat.* is not enough; it must allege they are foreign goods. *Bradley v. Long*, M. 1722, in *Sc. Bunb.* 119. *Sed qu.* Whether *vinum adustum* does not *ex vi termini* import the brandy to be foreign? *Ex postea* determined, that judgment shall not be arrested for this objection. M. 1723. *Ibid.*]

[Information must shew so much as to make a complete offence within the statute. As for having *India* silks it must shew, that there were warehouses continuing, and that the goods were not delivered out on security. *Holden v. Weedon*, T. 1724, *Bunb.* 117.]

[*Herba exotica*, without an *Anglice*, is sufficient in an information for unshipping tea, where there is a forfeiture of treble value. *Attorney-General v. Forgan*, T. 1728, *Bunb.* 254.]

[An information for mooring a merchant-ship at the king's moorings, on 10th Ann. is good against the master, tho' it does not aver that he was on board at the time of the mooring. *Horseman v. Gibson*, H. 3 Geo. in *Sc. Fort.* 32.]

In an information for grubbing up a wood, without saying that it was a wood at the time of the statute. *R. Hard.* 105.

If it be by way of recital, *quod cum*, without a positive charge, it is bad. *Semb. Sho.* 337.

An information for a libel, *cujus tenor sequitur*, will be bad, if it varies in a word. *Sal.* 660.

(D 4.) How the Information shall be quashed.

If an information by a common informer be bad, yet it shall not be quashed upon motion; for the defendant shall have costs, if it be for him. 1 *Sid.* 152. *Vide Indictment* (H).

[Information exhibited by rule of court shall not be quashed on motion. *Rex v. Nixon*, T. 5 Geo. Str. 185.]

[*Qui tam* information shall not be quashed on motion. *Rex v. Jocamb*, M. 7 Geo. 2. Str. 953. *Garland v. Burton*, P. 11 Geo. 2. Andr. 1724. Str. 1103.]

[If there is information for perjury on trial of information for a conspiracy, and all parties agree, the court, on consent, may arrest judgment on the conspiracy, and quash the information for perjury. *Rex v. Green*, *Rex v. Roper*, P. 10 Geo. 2. Str. 1072.]

[Information for exercising a trade without serving apprenticeship on 5 Eliz. shall not be quashed for objections arising from the face thereof; tho' it may for irregularity. *Rex v. Holmes*, P. 11 Geo. 2. Andr. 216.]

So,

So, an information by the attorney-general for not repairing an highway, where the issue is upon the right of repairing, shall not be quashed upon motion, till it be tried who ought to repair. 1 Sid. 140.

Nor, any information by the attorney-general. 1 Sal. 372.

But an information by the attorney-general, or master of the crown office being *ex officio*, may be quashed by the court upon motion, if there be cause. 1 Sid. 152.

[Information may be quashed on motion (without demurrer) for defect of jurisdiction. *Rex v. Williams*, T. 30 & 31 Geo. 2. 1 B. M. 385.]

[If the record of an information on a penal statute does not set forth all the things done as required by 18 El. c. 5. and it is removed by *certiorari* by the prosecutor before defendant has pleaded, it is not amended by these things appearing in the return, but all proceedings shall be stayed on motion. *Rex v. Holmes*, P. 10 Geo. 2. B. R. H. 5. 365.]

(D 5.) Imparlance, and Plea.

If the defendant appears upon recognizance, and information is filed against him, he may imparl till the next term. *R. Show.* 56. 1 Sal. 367. *Cont.* 3 Mod. 215.

So, in every case, where the defendant appears upon the first process, he shall have an imparlance of course. 1 Sal. 367.

To the next term, if the information lies in another county than *Middlesex*. Sal. 514.

If it lies in *Middlesex*, he shall have the whole term to plead. Sal. 514.

So, in the *Exchequer* upon an information, or *quo warranto*, except informations of seizures, it is sufficient if the defendant, not being taken upon process, pleads in 4 days of the next term after his appearance, and if he does not, there shall be judgment against him by *nil dicit*. *Rules and Orders in the Exchequer*, Rule 50.

But where the defendant appears upon an attachment, he must plead *instantly*. *Per Holt*, 1 Sal. 367. 3 Mod. 215.

And in the *Exchequer*, if he be taken upon process of contempt, he shall plead it in 4 days after appearance. *Rules and Orders in the Exchequer*, Rule 50.

If he be outlawed upon an information, and that be reversed. *R.* 1 Sal. 371. 514.

Or, comes into court upon a *cepi corpus*; for then he was in contempt. Sal. 514.

The defendant to an information may plead not guilty.

Or, he may plead, a former information depending for the same cause. *Tho.* 6. *Win. Ent.* 537. *Hob.* 128. *Mo.* 864. *Vide Action*, (K 2.)

By the *st.* 21 Jac. 4. in any information, action, &c. on a penal statute the defendant may plead the general issue not guilty, or *nil debet*, and give the special matter in evidence.

If the defendant plead and give security to answer for the goods seized, the court in discretion shall make restitution, or not. *Hard.* 97.

## (D 6.) Replication, &amp;c.

If the plaintiff reply to the plea to an information in the *Exchequer*, the defendant shall rejoin within 4 days, otherwise there shall be judgment against him by *nil dicit*. *Rules and Orders in the Exchequer, Rule 53.*

If the plaintiff demur, the defendant shall join within 6 days, otherwise there shall be judgment against him by *nil dicit*. *Rules and Orders in the Exchequer, Rule 52.*

## (D 7.) Trial, Judgment, &amp;c.

By the *st. 18 El. 5.* no jury shall be compelled to appear at *Westminster* on an issue upon a penal statute for an offence committed 30 miles distant, unless on the back of the *disfringas* it be noted, to be at the request of the attorney-general, which shall be for reasonable cause shewn.

Notice of trial in *London*, or *Middlesex*, shall be given 6 days before the trial. *Rules and Orders in the Exchequer, Rule 55.*

Notice of trial at the assizes shall be given within 6 days after the end of the term. *Rules and Orders in the Exchequer, Rule 55.*

[On information for a libel, there must be 14 days notice of trial; if defendant does not appear, his recognizance must be estreated. *Rex v Pain, Fort. 357.*]

[On information for a conspiracy, one defendant appeared, pleaded to issue, and was found guilty; judgment was given against him, before trial of the other conspirator, tho' the information was not laid, that defendant *cum multis aliis*. *Rex v. Kinnerfley, T. 5 Geo. Str. 193.* *Quod N.* for this seems contrary to the case there quoted, *Rex v. Sudbury, T. 11 W. 3.* But the difference is in that they had been tried, and only two found guilty of a riot, and the others found not guilty.]

Judgment shall be entred upon a rule given, in 4 days after the return of the *poslea*, within term, upon trials in *London*, or *Middlesex*, and in 4 days after a trial at bar, if there are so many within the term, otherwise upon the last day of the term. *Rules and Orders in the Exchequer, Rule 56.*

[The court will not stay entering up judgment, on an affidavit, that the witnesses were perjured, and are intended to be indicted. But *semb. per C. Baron.*—It might be done, if the indictment for perjury was found. *Rex v. Belling, M. 1728, Bunb. 256.*]

[Judgment will be arrested if the charge be too general, as where the clerk of a market was charged with having, under colour of his office, illegally caused his agents to demand and receive of several persons several sums of money, on pretence of weighing and examining their several weights and measures. *Str. 999.*]

An information being upon seizure of goods, the record of the judgment and fine upon it shall be finished before the first day of the next term after recovery, to the intent that the fine be transmitted to the pipe. *Rules and Orders in the Exchequer, Rule 49.*

The clerk of assize ought to return the *poslea* after trial in an information, or action by *qui tam*, to the proper officer, who shall send.



send a note to the clerk of the estreats in the *Exchequer*, to the intent that the sheriff be charged with the part of the penalty due to the king. *Ray.* 479.

And if the defendant does not appear after conviction and submit to a fine, a *capias pro fine* goes.

If he be taken and give security for his fine, a *superfedeas* goes. *Crompt. Just.* 213.

[Defendant convicted on information must appear in person, unless reason given him affidavit made. *Rex v. Harwood*, *P. 11 Geo. 2. Str.* 1088. *Andr.* 152.]

*Vide* more of *Information*, in *Action*, (K 2.)—*Amendment*, (2 C 2.)—*Guardian*, (H 4.)—*Officer*, (K 13.)—*Parliament*, (L 12.)—*Prærogative*, (D 72, &c.)—*Quo Warranto*, (C 3.)

INGROSSING.

*Vide Fine*, (G 2.)—*Justices of Peace*, (B 40, 41.)

INHIBITION.

*Vide Prærogative*, (D 34, &c.)

INJUNCTION.

*Vide Chancery*, (D 8, &c.)

INMATES.

*Vide Justices of Peace*, (B 85.)

IN MITIORI SENSU.

*Vide Action upon the Case for Defamation*, (F 16, &c.)

INN-KEEPER.

*Vide Action upon the Case for Negligence*, (B 1, &c.)—*Justices of Peace*, (B 30.)—*Pleader* (2 Q).

INNUENDO.

*Vide Action upon the Case for Defamation*, (G 10.)—*Indictment*, (G 4.)

INQUEST.

*Vide Enquest.*

INQUIRY, Writ of.

*Vide Amendment* (S).—*Courts*, (P 14.)—*Pleader*, (Z 1, &c.)

INQUISITION.

*Vide Forcible Entry*, (D 2. 15.)—*Officer*, (G 12.—K 12.)—*Uses*, (N 16, &c.)

## IN ROLMENT.

*Vide Bargain and Sale, (B 5, &c.)—Fine, (G 3.)—Parliament, (G 22.)—Patent (E).—Popery, (B 11.)*

## INSIMUL COMPUTAVERUNT.

*Vide Pleader, (2 G 11.)*

## INSPECTION.

*Vide Trial, (B 1, &c.)*

## INSTITUTION.

*Vide Esglise (I).*

## INSURANCE.

*Vide Merchant, (E 9, 10.)*

## INSURRECTION.

*Vide Viscount, (C 2.)*

## INTENDMENT.

*Vide Pleader, (C 25.—S 31, &c.)*

## INTENT.

*Vide Chancery, (3 A 1, &c.—3 Z 12.—4 H 7.)—Devise, (N 24.)—Pleader, (C 46. 58.)*

## INTEREST OF MONEY.

*Vide Chancery, (3 S 1, &c.—3 Y 9.)*

## INTERLINEATION.

*Vide Abatement, (H 1.)—Fair, (F 1.)*

## INTERLOCUTORY ORDER.

*Vide Chancery (V).*

## INTERPLEADER.

*Vide Chancery (3 T).*

## INTERROGATORIES.

*Vide Chancery, (P 5.)*

407  
INTESTATE.

*Vide Administration* (B 11.—H).—*Chancery*, (3 D 1, &c.)

INTIRE TENANCY.

*Vide Abatement*, (F 13.)

INTRUSION.

Intrusion upon the King.

*Vide Prerogative*, (D 71, &c.)

Intrusion of Ward.

*Vide Guardian*, (H 6.)

INVENTORY.

*Vide Administration*, (B 7, 8).—*Prohibition*, (G 19.)

JOINDER IN ACTION.

*Vide Abatement*, (E 8, &c.—F 4, &c.)—*Baron and Feme*, (V, &c.)—*Chancery*, (2 M 1, 2.—3 V 1, 2.)—*Parceners*, (A 4, 5.)

JOINT CONTRACTOR.

*Vide Abatement*, (E 12.—F 8.)

JOINT-TENANT.

*Vide Abatement*, (E 9.—F 5.)—*Chancery*, (3 V 1, &c.)—*Devise*, (H 7.—N 8.)—*Estates*, (K 1, &c.)

JOINTURE.

*Vide Chancery*, (3 Z 1, 2, 3.)—*Dower*, (E 1, 2.)—*Pleader*, (2 Y 13.)

JOURNEY ACCOMPTS.

*Vide Abatement* (P).

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I R E L A N D.

(A) A distinct Realm.

**I**RELAND is a realm distinct from *England*. 4 *Inst.* 349.

And therefore, treason committed there shall be tried by the *st.* 33 H. 8. 23. made for the trial of treason done out of the realm. 7 Co. 23. a. *Calvin*. 1 *And.* 262.

A fine and non-claim does not bar him who was in *Ireland*. *Pl. Com.* 368. b.



But *Ireland* is part of the dominion of *England*, and cannot be severed without act of parliament here. *Vau.* 300.

[By statutes 22 *Geo.* 3. c. 53. and 23 *Geo.* 3. c. 58. all legislative and judicial authority over *Ireland* are abolished.

### (B) When bound by the Laws of *England*.

(B 1.) By Act of Parliament made here.

THE subjects of *Ireland* are bound by the express words of the parliament here: as, if a statute speaks of *Ireland* in express words, 4 *Inst.* 350. *Adm.* 7 *Co.* 22. b. *Calvin.* *Vau.* 293. per *Ch. Just.* and not denied by the other justices. 1 *H.* 7. 3. a. *R.* 1 *And.* 263. 1 *Rel.* 17. *Vide post.* (B 2.)

So, statutes made here have been sent to be inrolled in *Ireland.* 4 *Inst.* 351.

So, a person in *Ireland* may be naturalized by the parliament here, *Vau.* 300.

And, being conquered, it is subject to the parliament of *England.* *Vau.* 301.

So, the parliament of *England* has power of judicature for all things done in *Ireland*: and therefore, shall try a peer of *England* for treason committed there. *Dy.* 360. b. in marg.

Tho' he be also a peer there; for being a peer of *England* he cannot be tried in *Ireland.* *Dy.* 360. in marg.

(B 2.) By other Laws here.

*H.* 2. commanded, upon request of the *Irish*, that his laws in *England* should be of force there. 4 *Inst.* 349.

5 *Ed.* 1. the same command. *Ry. F.* 2d vol. 78.

So, *H.* 3. sent thither the charter of king *John* and commanded, *quod leges illas teneant & observent.* 4 *Inst.* 350. 7 *Co.* 23. a. 2 *Bul.* 163. 1 *Rel.* 17.

And anno 30 *H.* 3. reciting, *quod tempore Johannis provisum fuit, quod omnes leges & consuetudines in Angliā teneantur in Hiberniā, & eadem terra eisdem legibus subjaceat,* the king grants, *quod omnia brevia que currunt in Angliā similiter currant in Hiberniā.* 4 *Inst.* 350. *Vau.* 294. 296. *Pal.* 458.

By the st. 10 *H.* 7. 22. in *Ireland*, all statutes late made in *England* concerning the common weal of the same shall be used, &c. in *Ireland* in all points according to the tenor of the same. 4 *Inst.* 351.

And therefore, all statutes made in *England* before 10 *H.* 7. are of force in *Ireland.* 12 *Co.* 111, 112. 4 *Inst.* 351.

So, the king, by patent under the great seal of *England*, may confirm the presentee of a church in *Ireland.* *Pal.* 459.

Or, make a dispensation to a bishop in *Ireland*, to hold a church in *England* in commendam. *R.* *Pal.* 458.

So, a *scire facias* in *Chancery* in *England* to repeal a patent under the great seal of *Ireland*, is good. *Pal.* 459.

But statutes made in *England* since 10 *H.* 7. 22. are not of force in *Ireland*, except where they extend to *Ireland* by express words. 12 *Co.* 112. 4 *Inst.* 351.

And

And therefore, the statutes of jeofails do not extend to *Ireland*, farther than the statutes there made warrant the amendment.  
2 *Rol.* 168.

### (C) Parliament in *Ireland*.

**I**N the time of *H. 2.* the treatise *de modo tenendi parliamentum* was transmitted by the king in a roll to *Ireland*, for holding a parliament there. 4 *Inst.* 12.

And in the time of king *John* a parliament was held there.  
4 *Inst.* 349.

*Anno 17 Ed. 3.* the parliaments in *Ireland* were regulated according to the institution of parliaments here, and for the same end.  
4 *Inst.* 350, 1.

By *Poining's act 10 H. 7. 4.* no parliament shall be held in *Ireland*, but on the king's lieutenant and council there certifying, under the great seal of *Ireland*, the causes for it, and the acts to be passed, and that such are expedient, and the king's licence and summons for a parliament thereon. *Vide 4 Inst.* 352. 12 *Co.* 110.

And by the *st. 3 & 4 Ph. & M. 4.* this may be, on certificate by the lord deputy, justices, or other chief governor. When the causes and acts sent be approved as sent, or with any alterations. And the parliament there holden may pass the acts so sent, or any other that during the parliament shall be sent thence and approved here, and transmitted thither from hence under the great seal of *England*.  
*Vide 12 Co.* 110.

And therefore, previous to a parliament in *Ireland*, the lieutenant, or other chief governor and council in *Ireland*, ought to certify to the king, under the great seal of *Ireland*, the causes for the parliament, and the acts to be passed there. *R. 12 Co.* 110, 111. 2 *Rush.* 20.

And these acts ought to be affirmed or altered, and transmitted under the great seal of *England*. *R. 12 Co.* 111. *Jon.* 189. 2 *Rush.* 20.

Then there ought to be a licence under the great seal, and a summons for the parliament there. *R. 12 Co.* 111. 2 *Rush.* 20.

The causes and acts transmitted under the great seal of *Ireland* ought to be kept in the *Chancery* here. 12 *Co.* 111.

If the acts transmitted are affirmed without alteration, they ought to be remitted after enrolment in *Chancery*, under the great seal of *England*. 12 *Co.* 111.

So, if they are altered, the alteration need not be made in the transcript from *Ireland*, which remains here; but the act altered shall be enrolled in *Chancery*, and remitted under the great seal of *England*.  
12 *Co.* 111.

So, after a parliament begun there, any acts may be transmitted from *Ireland*, and being approved or altered, remitted in the same manner under the great seal of *England*. 12 *Co.* 111.

And therefore, if the lieutenant summon a parliament of himself, without licence under the great seal, upon a certificate under the great seal of *Ireland*, tho' he has authority by his commission to do it, all proceedings upon it are void. 2 *Rush.* 20.

The parliament in *Ireland* try a peer of *Ireland* for high treason or felony committed there, by his peers. *Dy.* 360. b

And

And he shall not be tried by the *fl.* 26 *H.* 8. 13. 32 *H.* 8. 4. 35 *H.* 8. 2. or 5 *Ed.* 6. 11. for he cannot be tried by a jury, nor here by his peers. *R.* *Dy.* 360. *b.*

#### (D) Grant by the King concerning *Ireland*.

**S**O, the king, by a grant to a burrough in *Ireland*, may enable them to elect members of parliament there.

And a grant to a part of a corporation to elect vests the interest in the whole corporation. *Hob.* 14.

So, he may make the grant to a burrough not corporate. *R.* *Hob.* 15.

#### (E) Creation of Bishops there.

**S**O, the king by letters patent creates a bishop there. 2 *Rol.* 130. *Vide Ecclesiastical Persons, (C 2.)*

And a patent to an archbishop to make a consecration, by which it is said, *eligimus, creamus, &c.* *A. episcopum de B.* is sufficient, tho' it is not directed to *A.* himself. *R.* 2 *Rol.* 101. 130.

And if the king writes to the lieutenant and three others there, to take order that *A.* be made a bishop, and three of them are removed before the coming of the letter, and the other makes such a patent; it is sufficient, for the king's letter is only directed to his council there. *R.* 2 *Rol.* 101. 130.

So, the king may make a bishop of *Ireland* by patent under the great seal of *England*, as well as under the great seal of *Ireland*. *Pal.* 459.

But if a bishop be named and invested and installed to the bishopric, the former bishop being alive and not deprived, his denomination and investiture is void. *R.* 2 *Rol.* 131.

And tho' the former bishop afterwards die, the second bishop is not made lawful bishop. *R.* 2 *Rol.* 131.

#### (F) Usage there considered in Judgments.

**C**onsideration shall be had of the usage there, in the examination of judgments in *Ireland*: and therefore, if a *venire* be directed to the sheriff of a foreign county for trial in an ejectment there, without any cause alleged, it shall be good, being certified to be the usual course there. *R.* 2 *Rol.* 166.

So, an ejectment lies of so many acres of *mountain*, if it be land known there. *Semb.* 2 *Rol.* 167. [*Vide Pleader, (2 Z 1.)*]

#### (G) Remedy in *England*.

By Error, Appeal, &c.

**A** Writ of error lies in *B. R.* in *England*, upon a judgment given in *B. R.* in *Ireland*. *Cro. Car.* 511. 2 *Bul.* 163. 1 *Rol.* 17. *Carth.* 460. *Vide Pleader, (3 B 3.)*

And if the judgment be reversed, a writ shall be directed to the chief justice there, to award execution. *R.* *Cro. Car.* 512.

So,



So, an appeal lies to the delegates in *England*, upon a sentence given by the ecclesiastical court in *Ireland*. *Cro. Car.* 264.

So, an appeal to the parliament of *England*, upon a judgment in *Ireland* affirmed by the parliament of *Ireland*, lies, tho' *B. R.* cannot correct it, as it seems. *1 Sho.* 659. *Vide Pleader*, (3 B 6.)

So, an appeal lies to the House of Peers in *England*, upon a decree in *Chancery* in *Ireland*, and not to the Parliament there. *Ca. Parl.* 83. *Vide Parliament*, (L 7.)

So, remedy lies in the *Chancery* in *England* for a breach of trust, &c. touching lands in *Ireland*. *1 Ver.* 419. *Vide Chancery*, (3 X—A W 27.)

So, an action lies here, upon a personal contract touching lands in *Ireland*: as, upon an obligation, or covenant to grant a rent out of land in *Ireland*. *1 Ver.* 419.

So, upon a contract made there: as, upon an obligation, or covenant given in *Ireland*. *1 Ver.* 419.

So, a *scire facias* lies in the *Chancery* here, for repealing a patent in *Ireland*. *1 Ver.* 419.

So, the judges in *England* are the proper expositors of laws made in *Ireland*. *R.* *1 Ver.* 421, 422. *1 And.* 102, 103.

[By *stat. 6 Geo. 1. c. 5.* it is declared that the House of Lords in *Ireland* have not, nor of right ought to have any jurisdiction to judge of, affirm or reverse any judgment, sentence or decree, given or made in any court within the said kingdom; and that all proceedings before the said House of Lords, on any such judgment, sentence or decree, are utterly null and void to all intents and purposes.]

[But by *22 Geo. 3. c. 53.* this act is repealed, and since that time the writ of error lies from the court of *B. R.* in *Ireland*, to the House of Lords there, which is the *dernier resort*.]

## I S L A N D S.

*Vide Navigation*, (F 1, &c.)

## I S S U E.

*Vide Amendment* (O—Z).—*Appeal*, (G 13.)—*Droit*, (C 5.)—*Pleader*, (E 13, 14.—R 1, &c.—S 26. 39. 49.)

## J U D G E.

*Vide Copyhold*, (R 3.)—*County*, (C 2.)—*Courts*, (B 4.—C 2.—E 1.—P 16.)—*Herefy*, (B 4, 5.)—*Justices*, (I 1, &c.)

## Judge and Party.

*Vide Franchises*, (D 9.)—*Justices*, (I 3.)

## J U D G M E N T.

*Vide Abatement*, (I 14, 15. 36.)—*Accompt*, (E 15.)—*Amendment* (R).—*Annuity* (G).—*Appeal*, (G 15.)—*Affise*, (B 26.)—*Attachment* (G).—*Attaint*, (C 6.)—*Audita Querela*, (E 7.)—*Bail*, (R 10.)—*Chancery*

*Chancery* (3 W).—*Courts*, (P 13.)—*Dett*, (A 2.)—*Droit*, (C 6.)—*Error* (C).—*Fine*, (H 7.)—*Indictment* (N).—*Information*, (D 7.)—*Ireland* (F).—*Justices*, (X 1, 2, 3.)—*Justices of Peace*, (B 106.—D 15.)—*Parliament*, (L 5. 40, &c.)—*Patent*, (F 8.)—*Pleader*, (E 42.—M 1, &c.—S 44.—Y 1, &c.—Z 6.—2 D 15, 16.—2 E 5.—2 S 13.—2 V 17.—2 W 12, 13. 15. 36, &c. 51.—2 X 12.—2 Y 19.—2 Z 4.—3 A 7.—3 B 7. 20.—3 D.—3 F 4.—3 I 11.—3 K 29.—3 L 3, &c. 18.—3 N 5.—3 O 22.)—*Prærogative*, (D 77. 90.)—*Quo Warranto*, (C 5, 6.)—*Receipt*, (B 4.)—*Voucher* (G).

## JUDICATURE.

*Vide Courts*.—*Parliament*, (L 1, &c.)

## JUDICIAL PROCESS.

*Vide Process*, (D 9.—E 4, &c.)

## JURE CORONÆ.

*Vide Franchises*, (G 1.)—*Prærogative*, (D 63, 64.)

## JURE PATRONATUS.

*Vide Esglise*, (K 1, &c.)

## JURISDICTION.

*Vide Abatement*, (D 1, &c.)—*Admiralty*, (E 1, &c.—F 1, &c.)—*Affise*, (B 24.)—*Chancery*, (C 1, 2.—I 1.—3 X—4 W 27.)—*Convocation* (D).—*Copyhold*, (R 13, &c.)—*County*, (C 5, &c.)—*Courts, per Totum*.—*Franchises*, (D 9.—E 2.)—*Justices*.—*Justices of Peace*.—*Leet*, (L 1, &c.)—*London* (B).—*Officer*, (G 3.)—*Parliament*, (L 48.)—*Prærogative*, (D 9, &c. 28, &c.)—*Prohibition*, (F 11.)—G 1, &c.)—*Sewers* (D).—*Viscount*, (C 1, &c.)—*Uses*, (N 14, &c.)

## JURIS UTRUM.

*Vide Quare Impedit* (E).

## JURY.

*Vide Amendment* (H 1, &c.—Z).—*Ancient Demesne*, (F 1.)—*Attaint*.—*Challenge*, (A 1, &c.)—*Damages*, (E 1, &c.)—*Enquest, per Totum*.—*Justices of Peace*, (D 8.)—*London*, (L 2.)—*Pleader*, (S 46.)—*Sewers*, (C 5, 6.)—*Trial*.

## JUSTICE-SEAT.

*Vide Chase*, (R 1.)

## J U S T I C E S.

## (A) The Fountain of Jurisdiction.

**T**HE king is the fountain of justice. *Vide Courts (A).—Officer, (A 1.)—Prærogative, (D 37.)*

## (B) Justices cannot make a Deputy.

**A** Judicial officer cannot make a deputy. *Vide Officer, (D 2.)*

## (C) Justices, how created.

(C 1.) By Writ, &c.

**B**Y authority of parliament, tho' not extant, the chief justice of England (who was before created by patent) shall be created; and since the 25 *Ed. 1.* hath been always created by writ. *4 Inst. 75. 2 Inst. 26. Vide Officer, (A 1.)*

The other judges are made by patent. *Cro. Car. 1.*

And if upon the demise of the king there be a proclamation, that all judges retain their authority, it is not safe to intermeddle till the patent renewed. *Cro. Car. 1. Vide the stat. 1 Geo. 3. 23.* whereby the commissions of judges are continued, notwithstanding the demise of the king.

So, the chancellor, or lord keeper, shall be made by delivery of the king's seal and taking his oath. *4 Inst. 87. Vide Chancery, (B 1, 2.)*

(C 2.) By Commission.

What commissions the king may grant, *vide in Prærogative, (D 29.) Vide post. (G 1, &c.)—Justices of Peace, (A 6.)*

The commission determines by the death of the king. *Cro. Car. 98.*

Yet the proceeding of justices after the death of the king, till notice of it, will be good. *R. Cro. Car. 98.*

The manner of creation of antient offices cannot be altered without authority of parliament: as, if the creation used to be by patent, it cannot now be by writ. *4 Inst. 75.*

If it used to be granted during pleasure, it cannot be granted for life. *4 Inst. 87.*

[Before the *st. 13 W. 3. c. 2.* the commissions of the judges were *durante bene placito nostro*. *4 Inst. 75.* By that statute they are directed to be made *quamdiu se bene gesserint*; but on the address of both houses of parliament it may be lawful to remove them. And it was held that on the demise of the crown their seats were vacated. *Ld. Raym. 747.* And therefore it is enacted,]

[By *stat. 1 Geo. 3. c. 23.* judges commissioners continue during good behaviour, notwithstanding the demise of the king; but they may be removed on address of both houses of parliament; and their salaries shall be paid as long as their commissions continue; on demise of the crown, they shall be paid out of the duties granted for the civil list till further provision, and then out of the monies applicable to such uses.]



## (D) Precedence of Justices.

**I**F a justice be removed from one bench to the other, he shall have precedence according to his seniority.

So, if a baron of the *Exchequer* be removed to *C. B.* or *B. R.*  
1 *Sid.* 408.

As to justices of *B. R.*, *C. B.*, *Exchequer*, and several other courts,  
*vide Courts.*

As to justices of assize, *vide Assize*, (B 21, &c.)

As to justices of peace, *vide Justices of Peace.*

## (E) Justices in Eyre.

(E 1.) How constituted.

**J**USTICES in eyre were constituted 22 H. 2. *Hist. de C. L.* 141.  
23 H. 2. *Dugd. Or.* f. 51. *Vide Mad.* 84. [*Vide etiam Wilkins*,  
329.]

Or, rather had new circuits appointed; for there were justices in eyre. 20 H. 2. and before. *Mad.* 84, &c. 96.

Justices in eyre were constituted by a writ in nature of a commission. 4 *Inst.* 184.

And now, by the *st.* 27 H. 8. 24. they must be by letters patent under the great seal. 4 *Inst.* 184.

(E 2.) Their Authority.

Justices in eyre had jurisdiction of all pleas of the crown. 4 *Inst.* 184.

And of all actions real, personal and mixt. 4 *Inst.* 184.

Of claims of all franchises, and liberties. 4 *Inst.* 184.

In every county where justices in eyre came, the authority of every other court in the same county ceased during the eyre. 4 *Inst.* 184, 185.

So, the court of *C. B.* and every other court, except *B. R.* 4 *Inst.* 185.

And justices in eyre might proceed upon all pleas depending before others. 4 *Inst.* 184.

If judgment was given in *C. B.*, &c. the justices in eyre might award execution without a *seire facias*. 4 *Inst.* 184.

And a writ was usually directed to the justices of *C. B.*, &c. to send all pleas in the same county before them to be there determined. 4 *Inst.* 184. *Lit. f.* 514.

So, all actions, not determined during the eyre, were adjourned to *C. B.* *Co. L.* 294. a.

(E 3.) And Court,

The court before the justices in eyre had the following style; *placita de jurat. assis & coron. de itinere A. & sociorum justic. itinerant. apud O. in com. R. tali die*, &c. 4 *Inst.* 184.

And was held from seven years to seven years. 4 *Inst.* 184.

But by the increase of the authority of justices of assize, the authority of justices in eyre ceased. *Co. L.* 293. b.

## (F) Justices in Eyre of the Forest.

**B**UT justices in eyre of the forest now continue according to the original institution. 4 *Inst.* 184. *Vide Chase*, (Q 1.—R 1.)

The king by his commission constitutes a chief justice of the forest *citra Trentam*, and another to be chief justice in eyre of the forest *ultra Trentam*. 4 *Inst.* 291. 315.

And the king may associate others to him by a patent *si non omnes* and a writ *de admittas*. 4 *Inst.* 315.

And the chief justice, and others associated with him, may determine *omnia placita foresta*. 4 *Inst.* 291. 315.

And by *Ch. de For.* 16. *nullus constabularius*, &c. *teneat placita foresta*; and therefore, the chief justice in eyre and the others associated to him must, and no other can determine all offences done within the forest, according to the laws of the forest. *Manw<sup>d</sup>*, 489. 491. 4 *Inst.* 291.

And the claims of all liberties and franchises within the forest; as, to have a park, warren, leet, &c. to be quit of assarts, purpescitures, &c. *Manw<sup>d</sup>*, 488. 4 *Inst.* 291.

And if a thing which was done within the forest be before other justices, it must be pleaded to the jurisdiction. *Manw<sup>d</sup>*, 491.

If a justice in eyre holds his justice-seat, he ought to make a precept to the sheriff, for a general summons of all persons, who ought to appear there, and for making proclamation of the session, returnable forty days afterwards. *Manw<sup>d</sup>*, 492, 493. 4 *Inst.* 291.

And another summons to the warden of the forest to summon all the officers of the forest, and all those that claim liberties or franchises there. *Manw<sup>d</sup>*, 493. 4 *Inst.* 291.

Before the *st. de ch. de foresta*, all earls, barons, and others, in the county where the forest is, ought to appear at the general summons: but by that *st. c. 2. homines qui manent extra forestam non veniant de catero*. *Manw<sup>d</sup>*, 495.

And therefore, all out of the forest, if they have no suit or claim, nor are pledges for others, need not appear. *Manw<sup>d</sup>*, 495, 496.

Or, if they have no lands, nor are officers there. *Manw<sup>d</sup>*, 497.

So, barons of the realm, persons spiritual, women, servants, infants under twelve, sick men, or men above seventy, need not appear upon the general summons, tho' they are within the forest, if they have no claim, and their free tenants appear. *Manw<sup>d</sup>*, 498. *Cont. Jon.* 278.

So, a man may make a claim, or traverse an indictment against him by attorney. *Manw<sup>d</sup>*, 500.

So, if an officer make a deputy, he may appear by his deputy. *Jon.* 278.

If an officer of the forest does not appear, his office shall be seized for the king. *Jon.* 266. *Manw<sup>d</sup>*, 497.

So, if he does not bring in his rolls, *Manw<sup>d</sup>*, 506.

So, if a free tenant within the forest does not appear, his land shall be seized into the king's hands. *Manw<sup>d</sup>*, 500.

If four men and the reeve of any town do not appear, the whole town shall be amerced; but for a default afterwards every one shall answer for himself. *Jon.* 279.

Every

Every forester upon his appearance delivers his horn upon his knees to the justice in *eyre*, and pays 6*s.* 8*d.* for the re-delivery; and every woodward delivers his hatchet. *Jon.* 266.

### (G) Justices of *Oyer* and *Terminer*.

#### (G 1.) How appointed.

JUSTICES of *oyer* and *terminer* are by a general commission, or assigned for a special purpose. 2 *Inst.* 419. 4 *Inst.* 162. *Vide ante*, (C 2.)—*Prærogative*, (D 28, 29.)

And ought to be appointed by commission, and not by writ. 4 *Inst.* 164. *H. P. C.* 161.

And the commission ought to be in *Latin*, not in *English*. *R.* 12 *Co.* 31.

[But now all commissions shall be in *English*. *Stat.* 4 *Geo.* 2. c. 26. *f.* 1.]

And ought to contain the offences within the commission itself, and not in a schedule annexed. *R.* 12 *Co.* 31.

But others may be joined by a writ of association, admittance, and *si non omnes*. *F. N. B.* 111. *B.* 4 *Inst.* 165. *H. P. C.* 161. *Vide Assise*, (B 22.)

And if any of the commissioners or associates die, there may be another writ of association for others. *F. N. B.* 111. *D.*

#### (G 2.) Who shall be.

By the *st.* 34 *Ed.* 3. 1. justices of *oyer* and *terminer* ought to be named by the court, and not by the party.

And by the *st.* 2 *Ed.* 3. 2. and *W.* 2. 29. they shall be justices of the one bench, or the other, or justices errant.

And therefore, justices of assise are usually provided with a general commission of *oyer* and *terminer*.

But justices of peace, tho' by the *st.* 18 *Ed.* 3. 2. 34 *Ed.* 3. 1. and 17 *R.* 2. 10. they have power to hear and determine, are not intended by a statute which gives authority to justices of *oyer* and *terminer*. 2 *Rol.* 96. l. 25. *H. P. C.* 165.

[By 12 *Geo.* 2. c. 27. any person appointed may act as justice of *oyer* and *terminer*, or gaol delivery, in his own county, notwithstanding *st.* 8 *R.* 2. and 33 *H.* 8.]

#### (G 3.) In what Cases.

By the *st.* *W.* 2. 29. and 2 *Ed.* 3. 2. commissioners of *oyer* and *terminer* for grievous trespasses ought to be of the king's special grace. 4 *Inst.* 163. *Reg.* 123.

And the general commission is, for all treasons, felonies, riots, trespasses, and other offences. 2 *Inst.* 419.

And regularly, it shall be granted, when a great assembly, insurrection, or a heinous trespass is committed. *F. N. B.* 110. *B.*

So, it may be granted for a special purpose; as, upon a rescous made upon the king's bailiff. *F. N. B.* 112. *A.*

Upon a seizure of goods for wreck by malefactors, which are not wreck. *F. N. B.* 112. *C.* 4 *Inst.* 163. *Reg.* 126. Upon



Upon extortions, or oppressions by under-sheriffs, bailiffs, or other officers. *F. N. B.* 112. *D.* 4 *Inst.* 163. *Reg.* 126.

Hunting in the parks of a bishop in time of vacation. *F. N. B.* 112. *G.* *Reg.* 125. 7.

Defaults in sewers or walls against the sea. *F. N. B.* 113. *A.* *Reg.* 127. *Sewers* (A).

Collecting of toll, &c. by misdoers, when due to a corporation. *F. N. B.* 114. *C.* 119. *F.*

Cutting down trees. 4 *Inst.* 163.

But it ought not to be granted in cases not usual, or allowed by parliament. 4 *Inst.* 163. *Vide Prærogative*, (D 29.)

And it may be superseded, *quia non enormis*. 2 *Inst.* 419, 420. 4 *Inst.* 163.

Tho' it may be afterwards revived by *procedendo* if it appears to be *enormis*. 4 *Inst.* 163.

#### (G 4.) Their Authority.

Justices of *oyer* and *terminer* have authority of all offences within their commission.

Or, which by statute are to be determined in any court of record, or the king's courts of record. 4 *Inst.* 164. *Qu. H. P. C.* 161.

Or, which are prohibited by statute, but nothing said, in what court to be punished. *Dal.* 24. 4 *Inst.* 164.

They may determine the same day in which the inquiry is taken. 4 *Inst.* 164.

And they ought to send a precept to the sheriff for a jury, under hand and seal. 4 *Inst.* 164.

But commissioners of *oyer* and *terminer* cannot proceed upon an indictment not taken before themselves. 4 *Inst.* 164.

So, they cannot assign a coroner to an approver. 4 *Inst.* 165.

So, the commission of *oyer* and *terminer* will be determined, if there be no adjournment. 4 *Inst.* 165.

So, if a new commission be granted and shewn to them. 4 *Inst.* 165.

Or, a new commission be proclaimed, or the sessions held by it. 4 *Inst.* 165.

But by the *st.* 1 *Ed.* 6. 7. the commission shall not be determined by making or publishing a new commission or association, or altering the names of any of the justices or commissioners. 4 *Inst.* 165.

[The same of justices of gaol-delivery by the same statute.]

#### (H) Justices of Gaol-Delivery.

**BY** the *st.* 27 *Ed.* 1. *de finibus levatis*, justices of assize shall deliver the gaols of all prisoners, within liberties, or without.

And by the *st.* 4 *Ed.* 3. *c.* 2. good and discreet persons shall be assigned to deliver gaols thrice a year, or oftner if need be.

And therefore, justices of assize have usually a commission *ad gaolas in com.* *A. de prisoner. in ea existen. hac vice deliberand.* 4 *Inst.* 168.

And by some, they may do it *virtute officii*, without commission. *H. P. C.* 164.

So, others may be associated to them by writ of association, and admittance. 4 *Inst.* 169.

Or, they may be enabled by a writ *fi non omnes*, &c. to act, tho' some be absent. 4 *Inst.* 169.

But if there be a charter to bailiffs and recorder, *cum aliis quos* the king shall appoint, to deliver the gaol, &c. it will be void; for they can act only with others who cannot act but by commission, and so their authority is founded upon the commission, and the charter is void, for the king was deceived. R. 1 *And.* 296.

[Justices of gaol-delivery may arraign any man imprisoned in that gaol on an indictment before justices of peace, tho' not found before themselves, which justices of *oyer* and *terminer* cannot do.]

[They may take a panel of a jury returned by the sheriff without making any precept to him.]

[They may discharge prisoners by proclamation, may assign a coroner to an approver, and make process against the appellee in a foreign county; may award execution against a prisoner, who had been indicted before justices of peace, and thereupon outlawed; and may deliver the gaol of prisoners committed for high treason. 4 *Inst.* 169.]

[They may give judgment of death against any person found guilty of treason, &c. before former commissioners, and reprieved. St. 1 *Ed.* 7. c. 7. s. 5.]

[They as well as justices of *oyer* and *terminer* must send their records and process determined, and put in execution to the *Exchequer* at *Michaelmas* every year, to be kept by the treasurer and chamberlains in the treasury. 4 *Inst.* 165. 169.]

### (I) The Duty of Judges.

(I 1.) They ought to do Justice according to Law.

**A** Judge ought to act conformably to law, and not according to discretion.

By the *st.* 20 *Ed.* 3. 1. all our justices we command to do equal right and law to all our subjects, rich and poor, without regard to any person, or for letter or command from us, or any other, or for any other cause.

By the *same statute*, justices shall be sworn to take no fee, gift, reward, &c. to give no counsel, &c. *Vide Officer* (I).

Tho' there be a letter from the king, no regard shall be had to it. *Hob.* 16.

[If a cause has been argued, and stands over on an *ulterius concilium*, and a new judge is made since the former argument, it must be argued by new counsel; if it stands over for the opinion of the court, and it is argued again only for the information of the new judge, it may be argued by the former counsel. *West v. Morris*, M. 11 G. 2. *Andr.* 3.]

(I 2.) Ought to do it without Delay.

By the *st.* 20 *Ed.* 3. 2. we have charged the barons of the *Exchequer* that they do right to all our subjects, great and small, without delay, &c.

(I 3.) Shall not be Judge, and Party.

But none can be a judge in his own cause.

If

If there be an action in the court of mayor and aldermen upon a by-law, where the penalty is given to the mayor, it is error. *R. 1 Sal. 398. Vide Courts, (P 16.)*

Tho' the court be held by the recorder, and the mayor is absent; for it is the court of the mayor and aldermen, and the recorder acts for him. *R. 1 Sal. 398.*

So, if the chief justice of *C. B.* sues there before himself, & *sociis suis.* *1 Sal. 398.*

So, a judge of *C. B.* cannot take a fine from himself. *1 Sal. 398.*

So, a justice of peace being concerned, an order at the sessions before him, & *aliis sociis suis*, is bad. *R. Sal. 607.*

[On an appeal to the sessions against an order of removal those justices who are rated to the relief of the poor in either of the contending parishes cannot vote. *Rex v. Tarpole, M. 31 Geo. 3. 4 T. R. 71.*]

So, if any judge has an interest, he or his deputy cannot hear the cause, or sit in court; and if he does in *Chester*, &c. a prohibition goes. *R. Hard. 503.*

So, if *A.* sues an assise before *M.* and *W.* justices of assise, and *M.* dies, and by writ of association *A.* is associated with *W.* to be judge of assise; the suit by *A.* shall cease, for he cannot be judge in his own cause, and *W.* cannot proceed without him. *R. 45 Aff. 3. 8 H. 6. 20.*

Yet, a judge of a court may sue before the other judges of the same court, if the court can be held without him: as, the chief justice of *C. B.* may sue there, if the entry be *coram J. Blencowe*, &c. *1 Sal. 398.*

So, an alderman in the court of aldermen in *London*, by custom. *R. Sal. 425. 2 Lev. 200.*

So, in an action by *A.* who is mayor, &c. before himself, it is no error, if he does not appear by the record to be mayor. *2 Rol. 93. l. 27. 1 Sal. 398.*

### (K) High Treason; What shall be.

(K 1.) If one compass the Death of the King, Queen, or their eldest Son.

(K 1.) *What shall* **H**IGH treason is the greatest and most heinous offence against the king. *St. P. C. 1.*

By the common law, divers offences were treason, which now are not.

But by the *st. 25 Ed. 3. 2. pur ceo que divers opinions ont estre en que case doit estre dit treason, en que nemy, le royal request des seigniors et commons ad fait declarisment que ensuist. (Vide 3 Inst. 1.)*

(1.) By this statute it shall be high treason, *si home fait compasser ou imaginer la mort no'stre seignior le roy, madame sa compaignie, ou de lour fitz eigne et heire, et de ceo provablement soit attain de overt fact per gentz de son condition.*

And therefore, in every indictment for compassing the death of the king, &c. besides the compassing, an overt act must be alleged, and proved. *H. P. C. 13.*

And several overt acts may be alleged of the same species of treason in the same indictment. *Kelz, 8.*



[If divers overt acts are laid, and but one proved, it is sufficient; and where divers are laid, and some are defective in form, the indictment shall not be quashed for that. *Foster*, 194.]

But by the *st.* 7 *W.* 3. 3. no evidence shall be admitted of any overt act not expressly laid in the indictment.

[But an overt act not laid, may be given in evidence if it be a direct proof of an overt act that is laid. *Foster*, 9.]

[An offence which falls within one branch of treason, may nevertheless be an overt act of a different species of treason; thus *levying war*, conspiring to levy war to dethrone, imprison, &c. remove evil councillors, or *adhering*, or sending money or intelligence, tho' intercepted, are overt acts of *compassing*. *Harding's Case*, *Lord Preston's Case*, *Foster*, 197. 210. *Gregg's Case*, *Hensley's Case*, *Foster*, 218. 1 *B. M.* 642.]

An overt act for compassing the death of the king may be, that he actually killed the king. *Kelg*, 8. [And it is the compassing and not the actual killing that is the treason.]

Or, was instrumental to his murder. *Kelg*, 8. 10.

That he knowing of a design to kill the king (tho' his death does not follow) does an act which shews his approbation. *Kelg*,

Or, of a design to depose the king; for that is the same with conspiring his death. *H. P. C.* 11. *Dy.* 298. *b.* 3 *Inst.* 6. 12.

Or, to imprison him. *H. P. C.* 11. 3 *Inst.* 6. 12.

Or, to get him within his power. *H. P. C.* 13. 3 *Inst.* 6. 12.

As, if he levy war for such purpose. *H. P. C.* 13.

Or, assemble people. *H. P. C.* 13. 3 *Inst.* 12.

So, if he prepare weapons for such purpose. *H. P. C.* 13.

Or, write a letter to second the design. *H. P. C.* 13.

Or, write a letter to incite a foreign prince to an invasion. *H. P. C.* 13. 3 *Inst.* 14.

[Going into a foreign country, or purposing to go thither, and taking any steps in order thereto, to concert measures in order to an invasion, is overt act. *Lord Preston's Case*, 4 *St. Tri.* *Foster*, 196.]

[Inciting foreigners who are not at war with us to invade, falls under no branch of treason but this only. *Foster*, 197. *Hensley's Case*, 1 *B. M.* 642.]

Or, declare his design by writing. *H. P. C.* 13. *Vide Kelg*, 23. 3 *Inst.* 14.

[Writings published are overt acts. *Foster*, 198.]

[Writings not published, but found in a man's closet, if plainly relative to other treasonable practices charged in the indictment, are overt acts; so *Algernon Sidney's* would have been, were they capable of such connexion. So, *Lord Preston's*, *Gregg's*, *Layer's*, *Dr. Hensley's*, were. *Ibid.*]

So, if he declare his design by express words; for that, which plainly shews the imagination of the heart to put the king to death, is sufficient. *R. Kelg*, 13. *Cont.* 3 *Inst.* 14. *H. P. C.* 13. *Acc. St. P. C.* 2. *b.* [*Vide Foster*, 202. where it is said the rule here given is laid down in too great a latitude.]

[Words of advice or persuasion, uttered in contemplation of a traitorous design on foot or intended, are overt acts; but loose words not relative to any act or design, are not. *Foster*, 200.]

[So, a consultation and advising together of the means to do it, will be an overt act. *Kelg*, 15. 17. 20.]

So,

So, if a man, knowing of the design, meets at the consultation several times, tho' he does or says nothing; for the meeting shews his approbation. *R. Kelg, 17. 21.*

Or, knowing of the design, afterwards meets at a consultation. *Kelg, 17.*

[But *once* meeting conspirators on an indifferent occasion, and *concealing*, and *not assenting*, is not an overt act but only misprision. *Foster, 195.*]

So, if a soldier does an *overt* act of treason by command of a superior officer, it will be treason: because, the command being traitorous, the obedience will be so; for all are principles. *Kelg, 13.*

If a counsellor read a paper written for his instruction, (knowing the contents,) for promoting the traitorous design. *Kelg, 12.*

But a conspiracy to levy war is not high treason, nor an *overt* act of compassing the death of the king, if nothing be done in pursuance of it; for it is a species of another treason. *H. P. C. 13. [3 Inst. 14.]*

[So, a bare conspiracy to effect a rising to throw down *all* inclosures, alter law or religion, enhance price of *all* labour, open *all* prisons, pull down *all* meeting-houses, is not overt act of compassing. *Foster, 213.*]

[But a conspiracy to imprison or restrain the king by force till he yield to certain demands is an overt act to prove the compassing of the king's death. But there must be an overt act to prove that conspiracy to restrain, and then that overt act to prove such a design is an overt act to prove the compassing of the death of the king. *H. P. C. 109.*]

So, a calculation of the king's nativity is not an *overt* act of compassing his death. *H. P. C. 11.*

So, killing the king by accident, as by an arrow against a deer, is not treason; for he did not compass it. *3 Inst. 6.*

Or, by a lunatick, &c. for he cannot compass it. *3 Inst. 4. 6.*

[Overt acts required by the statute, are not to be considered merely as evidence to discover the intention, but as *means* made use of to effectuate it. *Foster, 203.*]

(K 2.) *Who shall be king, &c.*] The king before his coronation is within the *st. 25 Ed. 3. 2.* *H. P. C. 11. [Foster, 188.]*

So, a king *de facto*, tho' he be not *de jure*. *H. P. C. 12. 3 Inst. 7.*

Tho' the rightful king be afterwards restored. *H. P. C. 12. 3 Inst. 7.*

So, the queen regnant. *H. P. C. 12. 3 Inst. 7.*

But a king in title only is not within the statute; as, the consort of the queen regnant. *H. P. C. 12. 3 Inst. 7.*

Nor, a king *de jure*, who has not possession. *H. P. C. 12. 3 Inst. 7.*

[Nor, a king, who voluntarily resigns, and his resignation is ratified in parliament. *H. P. C. 104.*]

Nor, a viceroy, ambassador, &c. *3 Inst. 8.*

Yet, a king driven and kept out of possession by rebels is a king *de facto* and *jure*, inl within the statute; as, king Charles II. *ab anno 1648 ad 1660.* *R. Kelg, 15.*

[See the observations of Sir *M. Foster* on this case, 402.]

So, a queen consort is within the *st. 25 Ed. 3.* *3 Inst. 8.*

But not a queen dowager. *H. P. C. 12. 3 Inst. 8.*

So, the 2d or 3d son, when he becomes heir apparent, is the eldest son within the *st. 25 Ed. 3. H. P. C. 12. 3 Inst. 8.* [Tho' he be not the son of the queen the king's second wife.]

So, the eldest son of a queen regnant. *H. P. C. 12. 3 Inst. 8.*

So, it seems, the grandson of the king by his eldest son dead in the king's lifetime, as *Richard II.* after the death of the *Black Prince. H. P. C. 125. vol. 1.]*

But the heir presumptive is not within the statute; as, the brother of a king, who has no son, or issue. *H. P. C. 12.*

As, *Roger Mortimer, 11 R. 2. The Duke of York, 39 H. 6. H. P. C. 12. 3 Inst. 9.* [Unless by special provision by act of parliament, as in the case of the *Duke of York.*]

(K 3.) If he violate the King's Companion, his eldest Daughter unmarried, or the Wife of his eldest Son.

So, by the *st. 25 Ed. 3.* it shall be high treason, (2.) *si home violast la compaigne le roy, ou leign file le roy, nient marrie, ou la compaigne leigne fitz et heire le roy.*

And there must be an overt act of this offence. *H. P. C. 16.*

There must be manifest proof, not conjectural. *H. P. C. 16.*

And if the wife of the king, or of the prince consent, it will be treason in her also. *H. P. C. 16. 3 Inst. 9.*

And every daughter of the king, who is eldest at the time, is within the statute. *H. P. C. 16. 3 Inst. 9.*

But a queen dowager is not within the statute. *H. P. C. 16. 3 Inst. 9.*

(K 4.) If he levy War.

So, by the *st. 25 Ed. 3. 2.* it shall be high treason, (3.) *si home leve guerre encounter nostre seignior le roy en son realme.*

A man levies war, if he be in actual arms against the king.

If a man, being in arms with divers armed persons in his house, upon a message from the king by any of his council, commanding that he disperse those whom he has in arms with him, and come to the king, refuses, and afterwards continues in arms with armed persons in his house. *E. of Essex, R. Mo. 621.*

If he goes with a troop of officers and others from his house to a city, and asks their assistance, &c. *R. Mo. 621.*

If he maintains a fort or castle against the king's forces. *H. P. C. 14. 3 Inst. 10.*

[Holding a castle against the king's forces by actual force, is levying war; not the bare detainer, by shutting the gates. *Foster, 219.*]

[If it is done in confederacy with rebels, or if it is delivered up to them by treachery, or in combination, (not if thro' cowardice or imprudence,) it is. *Ibid.*]

[It is not necessary to a levying war, that there be the appearance of an army formed under leaders, or provided with military weapons, or drums, colours, &c. *Foster, 208. Damaree and Purchaser's Case, 8 State Trials, 218.*]

[Lifting and marching are sufficient overt acts, without battle. *Foster, 218.*]

And



And it will be treason, if war be levied in any respect against the king.

As, if it be intended to restrain the king within his house. *Mo. 621.*

To compel the king to remove any of his servants, tho' no damage is intended to his person. *Mo. 621.*

So, if it be intended to make a public reformation, and an actual force is employed for it: as, to make a change of religion. *H. P. C. 14. 3 Inst. 9.* for it is assuming a royal authority.

To impugn or change the laws or statutes. *3 Inst. 9.*

To remove a councillor, or other magistrate. *R. Poph. 122. 3 Inst. 9.*

[So, an attempt by intimidation and violence to force the repeal of a law, is a levying war against the king, and high treason. *Rex v. Gordon, H. 21 Geo. 3. Dougl. 590.*]

[Rising in a warlike manner to pull down a privy-councillor's house, and kill him, for the measures the king is taking by his advice, is levying war. *Benstead's Case, 1640, Foster, 211.*]

To expulse all strangers. *3 Inst. 9.*

To throw down inclosures throughout the whole country. *H. P. C. 14. R. Poph. 122. 3 Inst. 9.*

To pull down bawdy-houses. *Kelz, 65. 1 Sid. 358.*

So, to pull down all meeting-houses. *Damaree's Case, 8 State Trials, 218.*

[Or, for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest. *Foster, 213.*]

[Tho' a man is not concerned in the original design, not present at pulling any down, only present at burning the materials of one, inciting the rabble to resist the guards, and attacking them. *Purchaser's Case, 8 State Trials, 218. Foster, 218.*]

To open all prisons. *Kelz, 75. 3 Inst. 9.*

[But war levied to break prisons for the purpose of delivering one or more particular persons out of prison, wherein they are lawfully imprisoned, unless such as are imprisoned for treason, was ruled not to be high treason but only a great riot. *H. P. C. 134. Coke, P. C. p. 9.*]

To enhance the wages of labourers. *H. P. C. 14. 3 Inst. 10.*

If war be actually levied, all assisting in arms are traitors.

Tho' they do not know the intent *R. Mo. 621.*

Or, mistake the intent. *R. Mo. 621.*

So, all conspirators, tho' they are not in arms, if others of their conspiracy are. *H. P. C. 13, 14. 3 Inst. 9. R. Kelz, 19.*

[Furnishing rebels or enemies with money or provisions, is treason; unless compelled. *Foster, 217.*]

But raising a force to pull down a particular inclosure is only a riot. *H. P. C. 14. 3 Inst. 9.*

[So, a rising of weavers to destroy all engine looms, machines which enabled those of the trade who had them, to undersell those who had them not; was held not to have been levying war, because it was a point affecting the interest of the parties assembled. *Foster, 210.*]

So, a conspiracy to levy war is not treason within this branch of the statute, if war be not actually levied. *H. P. C. 13. 3 Inst. 9.*

So, it is not treason, if a man join rebels *pro timore mortis & recessit quam cito potuit*. *H. P. C. 14. 3 Inst. 10.*

If he does not aid or assist, or use any force, tho' he be present. *R. Kelg, 79.*

[But fear of having houses burnt, or cattle destroyed, will not excuse joining rebels or enemies. *M'Grouther's Case, 1746, Foster, 217.*]

So, a conspiracy to levy war in one part of a country, if war be levied in another part, does not make him guilty who does not appear privy or assenting to it. *R. Kelg, 19.*

[Attacking the king's forces, *in opposition to his authority*, is levying war; but not if on a sudden quarrel the neighbourhood drive the forces from their quarters. *Foster, 219.*]

(K 5.) Or, adhere to the Enemy.

So, by the *st. 25 Ed. 3. 2.* it shall be high treason, (4.) *si homo soit aidant as enemies nostre dit Seignior le Roy en son realme donnant a eux aid ou comfort, en son roialme, ou per aylours, et de ceo provablement soit ataint de overt fact.*

A man will be adherent to the enemy, if he gives them aid and comfort. *H. P. C. 14. 3 Inst. 10.*

[Conspiring with others to send intelligence to the enemy concerning the disposition of the king's subjects in case of an invasion, is an overt act. *Rex v. Stone, H. 36 Geo. 3. 6 T. R. 527.*]

[Any intelligence sent to the enemy in order to serve them in shaping their attack or defence, tho' the object of it may be to dissuade them from an invasion, is high treason. *Ibid.*]

[Furnishing them with money or provisions, or sending money, provisions, or intelligence, tho' intercepted, is an overt act of adhering. *Gregg's Case, 1707, Hensley's Case, 31 Geo. 2. Foster, 217. 1 B. M. 642.*]

[The indictment should be laid for sending a letter from the place where the *venue* is laid, *to be delivered* in parts beyond the sea to the enemy. *Foster, 218.*]

[A letter sent by one of several conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy. *Rex v. Stone, H. 36 Geo. 3. 6 T. R. 527.*]

[A paper found in the possession of one of the conspirators containing intelligence proved to have been collected by the prisoner, and in the hand-writing of the prisoner's clerk, is evidence against the prisoner. *Ibid.*]

[A paper, however, in the same hand-writing, not appearing to have any connection with the prisoner, is not evidence. *Ibid.*]

[Cruising on the king's subjects under an enemy's commission, is adhering, tho' no other act of hostility laid. *Foster, 218.*]

[If a subject of *England* makes war on the king's allies, engaged with him against the common enemy, it is *adhering*, tho' no act committed against the king or his forces. *Foster, 220.*]

If he surrender to them one of the king's castles for reward. *H. P. C. 14. 3 Inst. 10.*

[Holding

[Holding a castle against the king's forces, tho' only by bare detainer, without force, if in confederacy with enemies, or delivering it up by treachery or in combination, (but not if thro' cowardice or imprudence,) is adhering. *Foster*, 219.]

[States in actual hostility, tho' no war declared, are enemies. The fact, war or not, triable by jury. Public notoriety is evidence. *Ibid.*]

Men, not subjects, who come in an hostile manner into the kingdom, are enemies. *H. P. C.* 15.

As, the *Scots* who invaded *England* in queen *Elizabeth's* time; tho' the king of *Scotland* was then in amity *H. P. C.* 15. 3 *Inst.* 11. 4 *Inst.* 152.

And tho' it was done without his assent. 3 *Inst.* 11. 4 *Inst.* 152.

[If the subject of a foreign prince in amity with us invades us, without commission from his sovereign, or acts in a hostile manner, under commission from a prince at enmity with us, he is an enemy. *Foster*, 219.]

So, every one, not within the king's allegiance. 3 *Inst.* 11.

But a subject in rebellion is not an enemy; and therefore, if a rebel flies out of the kingdom, and *A.* knowing of his treason succours him, he is not a traitor within this branch. 3 *Inst.* 11.

So, if a subject comes with the king's enemies into the kingdom, he is not an enemy. 3 *Inst.* 11.

So, the prince of *Wales*, who holds of the king by homage, &c. is not an enemy; for he is within the allegiance. 3 *Inst.* 11.

In all these cases there must be an overt act proved. *H. P. C.* 16. 3 *Inst.* 12.

And by the *st.* 7 *W.* 3. 3. there must be proof of the same overt act alleged in the indictment.

And proof shall be by two witnesses to the same overt act, or to several overt acts of the same treason. *Kelz*, 9.

If there be at *Rome* a conspiracy to raise a rebellion, and some move to *England* with that intent, it will be an overt act. *Sav.* 4.

[If any person shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the limitations in the acts of settlement (1 *W. & M.* *st.* 2. c. 2. & 12 & 13 *W.* 3. c. 2.), from succeeding to the crown and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. 1 *Ann.* *st.* 2. c. 17.]

[If any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm otherwise than according to the act of settlement, or that the kings of this realm with the authority of parliament are not able to make laws or statutes, to bind the crown and the descent thereof; such person shall be guilty of high treason. 6 *Ann.* c. 7. *f.* 1.]

By *st.* 17 *Geo.* 2. c. 39. corresponding with, or remitting money to the pretender's son.]

[By *st.* 2. the pretender's son landing, or attempting to land in the dominions of the crown of *Great Britain.*]



## (K 6.) If he counterfeit the Great, or Privy Seal.

So, by the *st.* 25 *Ed.* 3. 2. it shall be high treason, (5.) *si homo counterface le grand ou privie seal le roy.*

Aiders, and consenters to counterfeit the great or privy seal, are within this statute. *H. P. C.* 18. 3 *Inst.* 16.

By the *st.* 1 *M.* 6. to counterfeit the sign manual, privy signet or privy seal, is made high treason.

[And by 7 *Ann. c.* 21. *f.* 9. to counterfeit the seals used in Scotland according to the 24th article of the union, is high treason.]

But fixing the great seal, &c. to a false patent is not treason, tho' it be misprison. *H. P. C.* 18. 3 *Inst.* 15.

Nor, fixing the seal by the chancellor, without warrant. *H. P. C.* 18. 3 *Inst.* 15.

Nor, a conspiracy to counterfeit the seal, if it be not counterfeited. *H. P. C.* 18. 3 *Inst.* 15.

So, receiving and abetting a counterfeitor of the great seal knowingly, after fact committed, is not treason, but misprison only. *R.* 12 *Co.* 81.

[Nor, the razing of the name of one manor out of a patent, and putting in that of another, nor any artificial removing of the true writing, and adding matter altogether new; nor, by the better opinion, the taking off the wax impressed with the great seal from a true patent, and fixing it to a writing purporting a grant from the king. *Kelg.* 80. 3 *Inst.* 15, 16. 12 *Co.* 15, 16, 17. 2 *Keb.* 74. *B. Treasf.* 3. 17. 4. 8. *Hawk.* vol. 1. page 41.]

## (K 7.) Or, Money.

So, by the *st.* 25 *Ed.* 3. 2. it shall be high treason, (6.) *si homo counterface money le roy, ou apport faux money en cest roialme counterfait al money d'Anglitterre sachant ceo estre faux, per merchander ou payment faire. Vide Money.*

[But only gold and silver money are held to be within this statute. 1 *Hawkins*, 42.]

Tho' it be not uttered. *H. P. C.* 20. 3 *Inst.* 16.

To counterfeit the proper coin of the realm is within the *st.* 25 *Ed.* 3. 2. and was also treason by the common law. *H. P. C.* 19. 3 *Inst.* 16.

[To counterfeit the impression of a guinea or half guinea on a piece of gold previously hammered, not round and not passable in the condition in which it then was, was adjudged not to be high treason, for the crime was incomplete. 2 *Black.* 632.]

[But barely uttering false money made within the realm, knowing it to be false, is not, as it seems, high treason nor a misprison of treason; but was at common law only a high misprison; and by 8 & 9 *Wil.* 3. *c.* 26. is in some cases made felony. 1 *Hawk.* 42.]

So, to bring in, knowingly, coin counterfeited *ad similitudinem monete Angliæ* from a foreign kingdom, and make payment with it. *H. P. C.* 21. 3 *Inst.* 18.

By the *st.* 1 *M.* 6. to forge and counterfeit gold or silver coin, not the proper money of the kingdom, if current in the realm by consent of

of the king, is high treason. If current by proclamation. *H. P. C.* 20.

By the *§. 1 & 2 Ph. & M.* 11. knowingly to bring into the realm from beyond seas coin counterfeit like money current in this realm, of intent to utter and pay the same, is high treason in the importer, his counsellors, aiders and abettors.

By the *§. 5 El.* 11. clipping, washing, rounding, and filing for gain the coin of this realm, or current by proclamation in it, is treason in the actors, their counsellors, and abettors. *Vide post.* (X 1.)

By the *§. 18 El.* 1. by any means for gain to impair, diminish, falsify, scale, or lighten the coin of this realm, or current in it by proclamation, is treason in actors, counsellors, and abettors. *Vide post.* (X 1.)

By the *§. 8 & 9 W.* 3. 26. (made perpetual by the *§. 7 Ann.* 25.) no person, unless employed in the mint and for the use of the mint only, or authorized by the treasury, shall knowingly make or mend (or begin or assist in it) any puncheon, stamp, dye, or mould of metal, earth, or sand, &c. whereon is impressed, or which will make or impress the figure or stamp of either side of gold or silver coin current, or edging tool or engine not of common use in trade, but contrived for marking edges of money like the edges of money coined in the king's mint. And the offenders, their counsellors, aiders, and abettors, shall be adjudged guilty of high treason.

[By *§. 2.* of the same statute, persons conveying out of the mint in the Tower of London, or any other of his majesty's mints, without lawful authority for that purpose, or assisting, &c. any puncheon, &c. used in the coining of money there, their counsellors, &c. shall be guilty of high treason. *Black.* 809.]

By *stat. 15 Geo.* 2. c. 28. to wash, gild, or colour, shilling or sixpence, true or counterfeit, or to add or alter any part of impression, to make it pass for a guinea or half guinea, or to alter halfpence or farthings, to make them pass for shilling or sixpence, is high treason.

[*§. 2.* persons uttering false money, knowingly, shall suffer six months' imprisonment, and give security for two years; for second offence two years' imprisonment, and security for two years more; and for third offence felony without clergy. For offences relating to the coin, not treason, see title *Coin and Coinage.*]

[*§. 3.* persons uttering false money, *knowingly*, twice in ten days, or that shall, at the time of uttering such false money, have about them one piece of counterfeit money besides that tendred, (it does not here say *knowingly*,) shall be deemed a common utterer of false money, and suffer one year's imprisonment, and give security for two years more; and if he afterwards tender false money, knowingly, felony without clergy.]

[*§. 6.* counterfeiting halfpence or farthings, two years' imprisonment, and security for two years more.]

[By *§. 11 Geo.* 3. c. 40. counterfeiting copper, or uttering it, is made felony.]

[By *§. 13 Geo.* 3. c. 71. person to whom gold coin is tendred, may cut it; if it shall appear diminished or counterfeit, the person tendering shall bear the loss, if not, the other; to be determined by mayor or justice.]

[By *§. 14 Geo.* 3. c. 42. silver coin, purporting to be of this kingdom, shall not be brought in under weight or fineness; and 5*l.* thereof  
in

in a ship, or on a person coming from it, may be seized; if it is weight and fineness, it shall be restored, if not, forfeited, half to the king, half to informer, and after condemnation, shall be melted, cut or defaced.]

[Tender in silver above 25*l.* is good only for its value at 5*s.* 2*d.* per ounce.]

[*Stat.* 14 *Geo.* 3. *c.* 70. directs light gold coin to be cut.]

(K 8.) If he kill the Chancellor, Treasurer, or King's Justices doing their Offices.

So, by the *stat.* 25 *Ed.* 3. 2. it will be high treason, (7.) *si home tuast chancellor, treasurer ou justices nostre seignior le roy del un bank ou del auter, justices in eyre et d' assise et tous auters justices assignes de oier et terminer esleauts en leur places fesants leur offices.*

Wounding of the chancellor, &c. if death does not ensue, is not within the statute. *H. P. C.* 17. 3 *Inst.* 18.

[But if any conspire to do the act, and one of the conspirators actually do it, this seems to be treason in them all. *H. H. P. C.* 230.]

Nor, killing them, if they are not in the exercise of their offices. *H. P. C.* 17.

Nor, killing any not named in the statute; as, lord steward, barons of the Exchequer, &c. *H. P. C.* 17. 3 *Inst.* 18.

[But the lord keeper, since the *st.* 5 *El.* *c.* 18. which declares the office of lord keeper to be to all intents and purposes the same as that of lord chancellor, is within this statute. *H. H. P. C.* 231.]

[But not the commissioners for executing the office of lord treasurer. *H. H. P. C.* 231.]

A judge of the Admiralty, or ecclesiastical court. 3 *Inst.* 18.

Nor, a peer in parliament, or a member of the House of Commons, tho' killed in their places. 3 *Inst.* 18.

[But by 7 *Ann.* *c.* 21. *f.* 8. to slay any of the lords of session or justiciary of Scotland in the exercise of their office is high treason.]

(K 9.) To maintain the Authority of the Pope.

By the *st.* 5 *El.* 1. if any person, after conviction and attainder for the first offence, do again by writing, teaching, &c. wittingly maintain the authority of the bishop of Rome, heretofore claimed in this realm, being under the queen's obeisance, his abettors, &c. to further such authority, &c. or, if any, within three months, after the first tender, do a second time refuse the oath of supremacy prescribed 1 *El.* 1. he shall be guilty of high treason. *Vide post.* (X 1.)

So, by the *st.* 13 *El.* 2. if any use, publish, or put in use any bull, &c. from Rome, or absolve or be absolved by colour of such bull, &c.

So, by the *st.* 23 *El.* 1. if any withdraw, &c. any from obedience, or to that intent to the *Romish* religion, or move to be reconciled, or be reconciled to the see of Rome.

So, by the *st.* 3 *Jac.* 4. *f.* 22. if any on the sea, beyond the sea, or in this realm, persuade or withdraw any subject from his natural obedience, or reconcile him, or move him to promise obedience to the pope, or see of Rome, or other prince, their abettors, &c. or, if any be reconciled, &c. unless he return, &c. and in six days submit and take the oaths of allegiance and supremacy. So,



So, by the *st.* 27 *El.* 2. if any Jesuit, seminary priest, or other ecclesiastical person, born in this realm and professed, &c. by authority of the see of Rome, come into or remain in this realm, unless in three days he submit and take the oath of supremacy and then come not within ten miles of the queen without licence during ten years: or, if any brought up in a seminary, &c. do not return in six months after proclamation in London, and in two days after return submit, &c. and take the oath of supremacy.

So, if any pretends authority to absolve or persuades a subject from his obedience, it will be treason within 23 *El.* 1. tho' he does not move any to decline his obedience. *R. Sav.* 3.

So, if he persuades any, &c. tho' he has not, nor pretends to have power to absolve. *R. Sal.* 3. For the learning arising from these statutes, see *H. H. P. C.* 329, &c. and *Hawk.* 67, &c.; and for other offences, by papists, &c. see *Popery*.

*Vide post.* (Y 3.)

### (L) Petit Treason; What.

(L 1.) To kill a Master.

SO, by the *st.* 25 *Ed.* 3. 2. petit treason is, *quant un servant tua son maister ou un feme tua son baron, ou quant home seculer ou de religion tua son prelate a que il doit foye et obedience.*

So, if a servant kill his mistress. *H. P. C.* 23.

Or, his master's wife. *H. P. C.* 23. 3 *Inst.* 20.

Tho' the servant be departed from his service, but kills upon malice there conceived. *H. P. C.* 23. 3 *Inst.* 20.

So, if a son, who has meat and drink from his father, kills him; for he is a servant. *H. P. C.* 24. 3 *Inst.* 20.

So, if a man, by the procurement and in the presence of a servant, kills the master, it is treason in the servant, tho' only murder in the other. *H. P. C.* 25. *Dy.* 128. 3 *Inst.* 20.

So, if the man was procured only to rob the master. *Dy.* 128.

Or, only to beat the master, and he kills him.

But if the master be killed by the procurement, but in the absence of the servant, the servant is only accessory to the murder. *H. P. C.* 23. 25.

But being in the same house, tho' not in the same room, is a presence. *H. P. C.* 24.

If the servant attempt to assassinate a stranger, but by mischance kills his master, it is treason; for he had a murderous intent.

And a circumstance, which makes a man guilty of murder, makes a servant guilty of petit treason. *H. P. C.* 24.

But if a servant kills his master without malice, it is only manslaughter. *H. P. C.* 24.

(L 2.) Husband.

If a wife kill her husband, it is petit treason. *H. P. C.* 23.

So, if she intend the death of another, and the husband is killed.

Or, if a stranger kill the husband by her assistance. *H. P. C.* 23.

Or, a servant, by her procurement, tho' she be absent. *H. P. C.* 23, 24, 25. 3 *Inst.* 20. *Dy.* 332.

If she desires her daughter to give powder to her husband for his recovery, which she does in her absence, whereby the husband is poisoned. *R. Kels*, 53.

But if a stranger kill the husband by the procurement of the wife who is absent, she is only accessory to the murder. *H. P. C.* 23. 25. *Dy.* 332. 3 *Inst.* 20.

If an husband kill his wife, it is only murder.

(L 3.) Prelate.

If a clerk religious or secular kill his superior, it is petit treason. *H. P. C.* 24. 3 *Inst.* 20.

[It is a species of murder, and a person guilty of it may be indicted for murder; and if murder is excepted in a pardon, petit treason is thereby excepted. *Foster*, 324, 325.]

Aiders and abettors to petit treason are within the *st.* 25. *Ed.* 3. 2. *H. P. C.* 24. 3 *Inst.* 20.

A man for petit treason shall have judgment to be drawn and hanged. *H. P. C.* 24. 268. 3 *Inst.* 211.

A woman to be drawn and burnt. *H. P. C.* 24. 268. 3 *Inst.* 211. *Vide post.* (Y 4.)

(M) Felony; Homicide.

(M 1.) Murder.

(M 4.) *By whom* **Q**uodlibet crimen capitale felleo animo perpetratum committed.] is felony. *Co. L.* 391. a.

And anciently high treason was pardoned by this word, *felony*, but not of late times. *Co. L.* 391. a.

But petit treason, homicide, burglary, robbery, arson, rape, and larceny, are now felonies. *Co. L.* 391.

*Homicide* comprehends murder, manslaughter, death by chance, *se defendendo*, or for justifiable cause.

*Murder* is, when a man sane and above the age of discretion kills another within the realm, on malice prepense. *H. P. C.* 43. 3 *Inst.* 47.

[There is no particular way of killing another, which is necessary to constitute a murder, but it may be committed in as many ways as there are by which an end may be put to life. *Strange*, 884.]

If a man upon malice kill another it is murder, tho' he was drunk. *H. P. C.* 43.

Tho' an infant, if he be above the age of discretion.

Or, under the age of discretion, if by circumstances it appears that he knew what the action was; as, by excuses, endeavouring to conceal, &c. *H. P. C.* 43, 44.

[A child of ten years of age may be guilty of murder. *York's Case*, 1748, *Foster*, 70.]

So, if a man procure a lunatick, &c. to kill. *H. P. C.* 43.

Tho' a *feme-covert*, by coercion of her husband. *H. P. C.* 65.

But it is not felony in a lunatick during his lunacy. *H. P. C.* 43.

Nor, in a *non compos*. *H. P. C.* 43.

Nor, in an infant, who does not know good from evil. *H. P. C.* 43, 44. (M 2.)

[M 2.] *Whose death shall be murder.*] It is murder, tho' the man killed be an alien, or denizen. 3 *Inst.* 50.

Or, attainted of high treason, or felony. 3 *Inst.* 50.

Or, in a *præmunire*. 3 *Inst.* 50.

Or, abjured.

Or, convicted and under execution for another crime. R. 3 *Mod.* 68.

But the person must be *in rerum natura*; and therefore, if a woman *præviement* *enfeint* by a potion destroy the child before it be born, it is not murder, H. P. C. 53. 3 *Inst.* 50.

Or, if another by a stroke given to her, destroy it. H. P. C. 53. 3 *Inst.* 50.

Yet if it be born, and afterwards die by means of the potion, or the stroke, it is murder. H. P. C. 53. 3 *Inst.* 50.

And he who advises the destruction before the birth, is accessory to the murder. H. P. C. 53, 54. 3 *Inst.* 51.

By the *st.* 27 *Jac.* 27. if a woman delivered of issue, which being born alive would be a bastard, endeavour by burying, drowning, &c. by herself or others, so to conceal its death, that it may not appear whether born alive or not, it is murder, unless she prove by one witness at least, that it was born dead.

The killing must be within the realm; for if a man be killed *in partibus transmarinis*, it is triable by the constable and marshal, and not by the common law. H. P. C. 54. 3 *Inst.* 48.

Stroke and death upon the high sea shall be tried by the admiral, or by commission upon the *st.* 28 *H. 8.* 13. H. P. C. 54.

Stroke upon the sea and death upon land cannot be punished. H. P. C. 54.

[By the *st.* 2 *Geo.* 2. 21. if any person shall be feloniously stricken or poisoned on the sea, or out of *England*, and die in *England*, or be stricken or poisoned in *England*, and die on the sea or out of *England*, an indictment, found in the county in *England* where such death, stroke, or poisoning shall happen, shall be as good and effectual in the law, as if such felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, had happened in that county.]

[M 3.] *Felo de se.*] If a man being *compos mentis*, and of the age of discretion, kill himself, it is murder. H. P. C. 28. 3 *Inst.* 54.

Or, if he gives himself a mortal wound, of which he dies within a year and a day. H. P. C. 28.

Or, if he pursues B. with intent to kill him, B. runs away and falls with his knife drawn in his hand, the pursuer falls on the knife, he is *felo de se*. H. P. C. 28. 3 *Inst.* 54.

Otherwise, if B. stands with a naked weapon for his defence, and A. runs upon it. H. P. C. 29.

[M 4.] *What manner of death.*] It is murder, if a man upon express malice poison another. H. P. C. 53. 3 *Inst.* 48.

Or, kill him with a sword, gun, bow, or any other weapon. H. P. C. 53. 3 *Inst.* 48.

Or, crush, bruise, smother, strangle, &c. to death. H. P. C. 53. 3 *Inst.* 48.

Or, famish. H. P. C. 53. 3 *Inst.* 48.

Or,



Or, set on a dog to kill him. *H. P. C. 53. 3 Inst. 48.*

Or, by any means maliciously put another to death.

Or, give him a mortal wound, of which he dies within a year and a day. *H. P. C. 55. 3 Inst. 47.*

Or, maliciously does any act, upon which death ensues, within a year and a day.

As, if he lay a sick man in the cold. *H. P. C. 53. 3 Inst. 48.*

Or, expose an infant till the cold, or a kite, &c. kill it. *H. P. C.*

53.

[If *A.*, *B.* and *C.*, in order to obtain the reward for apprehending highwaymen, conspire to procure *D.* to rob, which he does, and on the evidence of *B.* and *C.* he is convicted and executed, it is not murder. *Macdaniel, Bery, and Jones's Case, Foster, 131.*]

(M 5.) *What shall be malice prepense. Express malice.*—[*Malice afore-thought* is when the fact is attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit; or an action flowing from a wicked and corrupt motive; a thing done *mala animo, mala conscientia.* *Foster, 256.*]

Malice which makes killing to be murder may be express; as, a precedent menace.

Or, lying in wait.

Or, a precedent quarrel. *H. P. C. 48.*

So, if two men appoint a time or place of combat and one of them is killed, it is murder. *H. P. C. 48.*

Or, if without appointment they meet and fight, upon malice. *H. P. C. 47.*

Tho' he that killed gives the first blow. *H. P. C. 47.*

Tho' he that kills declines the duel, and was only persuaded to it, by importunity, and to save his honour. *H. P. C. 48.*

Tho' he that kills refuses to strike, but offers a pot of ale to the other to touch him; whereupon *B.* strikes and *A.* kills him. *H. P. C. 48. Strange, 773.*

Tho' the quarrel was sudden, and thereupon a duel appointed for the next day. *H. P. C. 48. 3 Inst. 51.*

Altho' he that kills, after the first stroke, flies to a wall and then kills the other in his own defence. *H. P. C. 42. 47.*

Or, if the duel be fought after the passion cools. *R. 1 Lev. 181.*

[If *A.* and *B.* play, then wrestle, then cudgel, *A.* gives *B.* a smart stroke, *B.* grows angry, throws away his cudgel, they fight in earnest, are parted; *A.* goes away angry, and threatens to fetch something, and stick *B.*; he changes his clothes, returns with a sword concealed, and a cudgel in his hand, draws on a discourse of the quarrel, and offers to cudgel if *B.* will keep off his hands; *A.* drops the cudgel which *B.* takes up, and gives *A.* two blows on the shoulders; *A.* draws out the concealed sword, says, "stand off, or I'll stab you," thrusts at, but misses him, *B.* goes back, *A.* shortens his sword, leaps towards *B.*, stabs him, and he dies; it is murder. *Mason's Case, 1756, Foster, 132.*]

[If *A.* and *B.* quarrel, offer to fight, are prevented, stay an hour in company, *B.* offers to make it up, *A.* refuses it, *B.* going away with the rest of the company, called back by *A.*, they fight and *B.* is killed;

killed; it is murder in *A.*, tho' it was found that there was no reconciliation, tho' *B.* gave *A.* three wounds, and owned he received his wounds fairly. *Rex v. Oneby*, T. 13 G. on great deliberation, by the twelve Judges unanimously, *Ld. Raym.* 1485. *Str.* 766.]

[On a special verdict, the court are judges of the malice, and whether there was time to cool, or the act deliberate or not, and not the jury. *By all the Judges, ibid.*]

(M 6.) *Tho' it does not extend to the life.*] So, if a man is killed upon malice, it is murder, tho' the malice did not extend to his life, but only to a corporal damage. *H. P. C.* 49, 50.

As, to beat him. *H. P. C.* 49.

(M 7.) *Tho' against a stranger.*] So, if the malice was against another; as, if *A.* with malice aims at *B.* but kills *C.* *H. P. C.* 50.

If *A.* intends poison for *B.* but by misadventure *C.* takes it. *H. P. C.* 50.

If *A.* with malice assaults the master, and in the quarrel kills the servant. *H. P. C.* 50.

If there be a duel upon malice, and *C.* attempts to part them, and one of them kills him. *H. P. C.* 50. 22 *Aff.* 71.

[So, in the case of a sudden affray where no felony is committed nor wound given, if a person interposing to part the combatants giving notice to them of his friendly intention, should be killed by either of the combatants, it would be murder in the person so killing. *Foster*, 272. *Vide M.* 20.]

(M 8.) *Aiding one who has malice.*] So, if the malice be in another person; as, if one commits murder, all present and aiding are guilty of murder, tho' they had no particular malice against the person killed. *H. P. C.* 51.

As, if there be a duel upon malice between *A.* and *B.*, and *C.* be second to *A.* who kills *B.*; this is murder in *C.* *H. P. C.* 51. [*Vide Rex v. Borthwick*, T. 19 Geo. 3. *Dougl.* 207.]

(M 9.) *Malice implied. If a man kills without just provocation.*] [In all possible cases deliberate homicide is murder, whatever the provocation may be. *Foster*, 296.]

And in some cases implied malice makes the crime murder; for the law presumes malice, when a man kills another without sufficient provocation. *H. P. C.* 45. 3 *Inst.* 52.

As, if he kill another, who distorts his face and ridicules him. *H. P. C.* 45. *R. Cro. El.* 778.

Or, who provokes him only by indecent words: as, if a master kill his apprentice that answers him saucily. 10th October 1666, *Grey's Case*, Com. 15. *R. 1 Lev.* 180.

[But here a distinction must be made; for if the party killing on such provocation make use of a deadly weapon, or otherwise manifest an intention to kill or to do some great bodily harm, it is murder; but if he had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill, and had unsuckily against his intention killed, it had been but manslaughter. *Foster*, 291.]

Or, with a sword kills a servant that refuses his command. *R. 8 W. 3. Keate. Com. 13.*

Otherwise, if a man gives his servant proper correction, and kills him by an unlucky stroke; that is only manslaughter. *Turner's Case.*

So, if a man be cutting wood in a park, and the parker ties him to an horse and beats him, whereby the horse runs away and kills the man, it is murder. *R. Cro. Car. 131. H. P. C. 49.*

So, if one strike a child in the high street with his dagger, of which he dies. *Sav. 67.*

[If *A.* throw a bottle at *B.* and then draw his sword, and *B.* throw another bottle at *A.* and *A.* stab *B.*, it is murder. *Foster, 296. Marw- gridge's Case.*

(M 10.) *Unlawful act.*] When a man does an unlawful act and death ensues, it is murder; as, if a man rob an orchard, and being rebuked by the owner, kills him.

If a man commits a riot, and in the doing of it another is killed. *H. P. C. 47.*

If malefactors in a park kill the parker. *H. P. C. 46. R. Pal. 35. Sav. 67.*

Tho' the parker shoots, and upon flight pursues them, and then is killed. *H. P. C. 46. Pal. 35.*

So, if a man assaults another to rob him, and after resistance and stroke, kills him. *H. P. C. 45, 46.*

And if several do an unlawful act, and one of them kills a man, it is murder in all aiding the unlawful act. *H. P. C. 51.*

[If several be indicted, *A.* as giving the blow, and the others as present, aiding and abetting, *evidence* that one of the others gave the blow and that *A.* was only present, &c. will support the indictment. *1 H. H. P. C. 437.*]

And in all ready to give aid, tho' only lookers on. *H. P. C. 51.*

Tho' out of sight, in another room, or at half a mile distant in the same park. *H. P. C. 51.*

[But on a special verdict, principals in the second degree cannot be affected, unless the jury find expressly, that they were actually present, or that some acts were done by them which unavoidably shew that they were present, or that they were of the same party, on the same pursuit, and under engagements and expectation of mutual defence and support from the person who did the fact. *Doug. 207.*]

If *A.* begins a riot, which continues for an hour, and then *B.* is killed by another, it will be murder in *A.* *R. 1 Sal. 334, 335.*

[To render the killing murder in all those who assembled to do an unlawful act, it must appear that it was committed in prosecution of some unlawful purpose: thus, smugglers assemble to run wool, officers oppose, a smuggler fires a gun, and kills another smuggler; if it does not appear it was levelled at the officers, the other smugglers present are not guilty, for it does not appear it was in prosecution of the purpose for which they assembled. *Plummer's Case, Foster, 352.*]

[Three soldiers go to rob an orchard, two get up the tree, the third stands at the gate with a drawn sword, the owner's son comes, seizes



seizes him, he stabs him; those in the tree not guilty; otherwise, had they came with a general resolution against all opposers. *Per Holt, Foster, 353.*

[A general resolution against all opposers may be collected from their number, arms or behaviour, at or before. *Ibid.*

*Qu.* How the above case is reconcileable to this doctrine? for the foldier standing at the gate with a drawn sword indicates a general resolution to resist all opposers, if the two robbing the tree knew of the circumstance of the drawn sword and consented to it.]

[If *A.*, *B.*, and *C.* ride out to commit a robbery, *C.* turns into another road, and joins them no more; *A.* and *B.* rob on the same day; *C.* is not guilty. *Foster, 354.*]

[If persons assemble for a lawful act, and prosecute it lawfully; and others oppose, and one of the opposers is killed; none are guilty but those who actually aided or abetted in the fact. *Ibid.*]

(M 11.) *Act apparently mischievous.*] When a man with a mischievous intent does an act apparently mischievous, and death ensues, it is murder.

As, if he ride among a multitude with an horse used to kicking. *H. P. C. 44.*

If he throw a stone over an house among a multitude to hurt them. *H. P. C. 44. 3 Inst. 57.*

If he wilfully prepare poison and lay it for any person. *H. P. C. 44. by the 1 Ed. 6. 12. 3 Inst. 52.*

(M 12.) *Killing an officer.*] When an officer is killed in the execution of his office, it is murder; as, a watchman or constable. *H. P. C. 45. Sav. 67. 3 Inst. 52.*

Serjeant or magistrate. *H. P. C. 45. 3 Inst. 52. Sav. 67.*

Or, any in their assistance. *H. P. C. 45. 3 Inst. 52. Foster, 309.*

[Tho' it is not on the spot, but coming or going. *Foster, 308.*]

[Or, if he interpose to prevent mischief, or endeavour to apprehend felons; tho' not present, but on hue and cry, or fresh pursuit. *Foster, 309.*]

[But the officer should be known, or notify with what intent he comes, by commanding the peace, &c. *Foster, 310.*]

Tho' he be not known to be an officer. *H. P. C. 45, 46.*

Tho' the process is erroneous. *H. P. C. 46.*

[In arrests on process, he should give notice of his authority. *Foster, 311.*]

But if the officer does what is not warrantable, it is only manslaughter. *H. P. C. 46. R. Mar. 4.*

If the process mistakes the name, or addition of the party. *Dy. 88. a. in marg. R. Jon. 346.*

[It is sufficient, that the process is not defective in the frame, and issue in the ordinary course, tho' there was error in the proceedings before; and if the warrant is produced at the trial, the judgment or decree need not. *Per Hardwicke C. J. Rogers' Case, 1735, Ibid. Vide Forcible Entry, (D 18, 19.)*]

[If the process is defective in the frame, if there is a mistake in the name or addition of the person on whom it is to be executed, or if his name or the name of the officer is inserted without authority and

after issuing the process, or the officer exceeds his authority, and is killed, it is only manslaughter in the person whose liberty is invaded. *Foster*, 312.]

[As to strangers, it has been ruled, that if a person is unlawfully deprived of his liberty, a stranger may attempt his rescue, and if he kills, it is manslaughter; for that when the liberty of the subject is invaded, it is a provocation to all the subjects of *England*. *Tooley's Case*, 4 *Ann. Sed qu. Foster*, 312. & *seq.*]

[There must have been a felony committed, to bring a private person within the protection of this law. *Foster*, 318.]

[If there has been a felony, but not by the person pursued, and one endeavouring to arrest, kills, or is killed, it is not murder in either case, but manslaughter. *Ibid.*]

[But if *A.* a peace-officer has a warrant to apprehend *B.* by name, for felony, or *B.* is indicted for felony, or the hue and cry raised against him by name, and he, tho' innocent, flies or resists, and *A.*, or any joining, is killed by *B.* or any of his accomplices joining in that outrage, it is murder. *Vide M.* 20.]

(M 13.) *Officer exceeding his jurisdiction.*] When an officer of justice exceeds the limits of his jurisdiction in the death of another, it is murder; as, if a justice of peace gives judgment for high treason, and the officer executes, it is murder in both. *H. P. C.* 35.

If a justice of peace give judgment of death for a trespass, it is murder in him; but the executioner is excused. *Ibid.*

If a judge executes a criminal; for that belongs to the sheriff. *Ibid.*

Or, if a stranger does it of his own head. *Ibid.*

So, if a sheriff behead a man condemned to be hanged. *Ibid.*

[But if an officer, by warrant from the crown, beheads a person under sentence of death for felony, or a woman for treason, it is not murder nor criminal. (*Vide X* 1. 3. *post.*) *Foster*, 268.]

If any execute martial law in time of peace. *H. P. C.* 46.

If a gaoler by duress kill his prisoner. *Ibid.*

If a gaoler carries his prisoner, against his will, whom he knows has never had the small-pox, but fears it, to a place where he knows a person having it is, and the prisoner catches it and dies, it is murder. *Vide Castel v. Bambridge*, *H.* 3 *G.* 2. *Str.* 854.]

[If a gaoler (as warden of the *Fleet*) has a lawful deputy, whose servant by duress (of confining in an unwholesome room) kills his prisoner, it is not murder in the principal, tho' he sometimes acted as warden, and once saw the deceased in the unwholesome room. *Rex v. Huggins*, *M.* 4 *G.* 2. *Str.* 882. *Ld. Raym.* 1574.]

[But it is murder in the servant. *Ibid.*]

[If defendant in a civil suit, fearing arrest, flies, officer pursues, and in the pursuit kills, it is murder. *Per Hale*, 481.]

[Or, manslaughter; according to circumstances. *Per Foster*, 271.]

[Persons having authority to arrest or imprison, using the proper means for that purpose and being killed in the struggle, it is murder in all who take a part in such resistance, and this will hold in all cases, whether civil or criminal. *Foster*, 270.]

[So, in case of breach of the peace, or any misdemeanor short of felony. *Ibid.*]

(M 14.) *Homicide upon the stat. 1 Jac. 8.*] By the *st. 1 Jac. 8.* any who stabs a person, not having a weapon drawn, nor first stricken, so that he die in six months, tho' malice aforethought cannot be proved, shall suffer as for murder (except in cases of self-defence, misfortune or for preserving the peace, or chastising his child or servant).

[Tho' the words of the statute be general, yet cases coming within the letter of the act, and not covered by any of the exceptions, have very rightly been adjudged not to be within the meaning of it, the justice or benignity of the law over-ruling the rigorous penning of the statute. *Foster, 298.*]

[A cudgel, or other thing proper for defence or annoyance in the hand of the party, is a weapon drawn. *Foster, 300.*]

[Not having *first* struck, means not having given the first blow; *per eleven Judges. Contra per Richardson and Holt.* It means, before the mortal wound was given. *Foster, 301.*]

But this does not extend to persons present, who do not give the stab. *H. P. C. 58. R. Al. 44.*

[As, a husband stabbing adulterer is not within the act.]

[Nor, a man assaulted by thieves in his house.]

[Nor, if an officer pushes into a gentleman's chamber early to arrest him, and does not tell his business, nor use words of arrest.]

[Nor, if one concealed in a closet, but no thief, is stabbed, on a sudden outcry of thieves in the night time. *Foster, 298.*]

Nor, to a person who in a passion throws a hammer at another. *R. Jen. 433.*

[Firing, or shooting an arrow, or thrusting with a staff or blunt weapon, are within the statute, but throwing any weapon, not. *Foster, 300.*]

Nor, to those, who are not indicted upon the statute. *H. P. C. 58.*

The indictment need not conclude *contra formam statuti.* *H. P. C. 58. Al. 44.*

And tho' the indictment be upon the statute, the jury may find manslaughter generally. *H. P. C. 58. Al. 44.*

[If the offence is barely manslaughter at common law, the prisoner is rarely convicted on the statute. *Foster, 299.*]

If the person killed had thrown a pot at the other, he shall be said to have had a weapon drawn. *R. per five J. 3 Lev. 256.*

*Vide post. (Y 5.)*

#### (M 15.) Manslaughter.

(M 15.) *If one kill upon a reasonable provocation.*] The distinction between murder and manslaughter began upon the plan of the Mosaic law. *Eq. Ca. 270.*

And therefore, where a man kills another upon a reasonable provocation given, it will be only manslaughter.

As, if a son having been beaten complain to the father, who goes three-quarters of a mile, and beats the person that misused his son, upon which he dies. *H. P. C. 48. R. 12 Co. 87.*

If a servant, seeing his master assaulted, kills the assailant. *H. P. C. 51, 2.*



If a stranger seeing two men fighting, helps one and kills the other. *H. P. C.* 52. *R.* 1 *Sid.* 160. 12 *Co.* 87.

If a man sees another taken by a prest master, who upon demand refuses to shew his warrant, and for this he kills the prest master. *R.* per eight *J.*

If a collector of tallage makes a distrefs, and, being resisted, kills. *R.* 1 *Vent.* 216.

If a man sees his wife in adultery, and kills the adulterer. *R.* 1 *Vent.* 158.

If a man kills an officer who arrests him without warrant.

Or, who exceeds his warrant; as, if he break an house to make an arrest. *H. P. C.* 46.

If a man kills another, who attempts to enter into his house upon pretence of a title. *H. P. C.* 40. 57.

Or, to recover a possession gained by force. *H. P. C.* 40. 56.

[If an officer on the impress service fire in the usual manner at the hall-yards of a boat in order to bring her to, and kill a man, it is only manslaughter. *Cowp.* 830.]

[If a traveller, before he lights from his chaise, fires his pistols, and kills one by accident, it is manslaughter. *Rex v. Burton*, *M.* 8 *G. Str.* 481.]

[Two bailiffs who killed a prisoner (*Mr. Lutterel*) in his own house by giving him nine wounds with a sword, and shooting him with a pistol when he was fallen on the ground, found guilty of manslaughter only; because it appeared that he had given one of them a blow with his cane. He had a sword, which was drawn and broken; how did not appear. He had brought the pistols into the room, and declared he would not be forced out of his lodgings. He threatened the officers. Both the officers were slightly wounded. *Rex v. Reason and Tranter*, *H.* 8 *G. Str.* 499. *Foster*, 292.]

[If the captain of a ship has a press-warrant, directing that no person but a commission-officer is to be intrusted with the execution of it, and his name to be inserted on the back of it; and he accordingly appoints his lieutenant, who stays in the ship, and the captain sends his boat with some of the crew to press, and some leagues off they board a ship, and attempt to press, and one of them is killed, it is manslaughter; for they did not act according to the warrant. *Broadfoot's Case*, 1743, *Foster*, 154.]

*N. B.* It was on occasion of this case that *Mr. Justice Foster* published his celebrated argument, asserting the legality of impressing mariners for the sea service.

[There is a species of homicide excusable in self-defence, distinguishable from homicide justifiable, and from manslaughter: thus, where *A.* and *B.* quarrel suddenly and fight, and *A.* before any mortal wound given retires as far as he can, but being pursued by *B.* and obliged in order to save his own life, kills *B.*; this is homicide excusable *se defendendo*, and it matters not who gave the first blow; but if *A.* did not retire before any mortal blow given, it is manslaughter; and if *A.* gave the first assault on malice, which must be collected from circumstances, and to give himself colour retreated, and then turned and killed *B.*, this is murder. *Foster*, 277.]

(*M* 16.) Upon sudden quarrel.] So, upon a sudden quarrel: as, if

if two quarrel for the wall and fight, and one of them is killed. *H. P. C. 57. 3 Inst. 55.*

If two quarrel and one of them fetches a weapon and kills the other. *H. P. C. 56.*

If two fight, and one of them breaks his sword, and a stranger gives him his sword, with which he kills the other; this is manslaughter in both. *H. P. C. 57.*

So, if two quarrel and agree to fight, and fetch their swords, and the one kills the other; for the blood never cooled. *H. P. C. 48. 56. 3 Inst. 55.*

So, if two quarrel and part, and presently meet and fight, and one of them is killed. *H. P. C. 56.*

Tho' there was former malice; if they were reconciled and quarre upon a new occasion. *H. P. C. 49.*

If they fight upon malice, and are parted, and afterwards fight again upon a sudden. *H. P. C. 49.*

If *A.* and *B.* have malice, *A.* challenges, *B.* refuses, but says he will go to such a town, and in the way *A.* assaults, and *B.* kills him. *H. P. C. 48.*

[*A.* gives provoking language, *B.* strikes, combat ensues, *A.* is killed; manslaughter. *Foster, 295.*]

[*B.* draws his sword, makes a pass at *A.*, his sword then undrawn; *A.* then draws, combat ensues, *A.* is killed; murder. But if *B.* had first drawn, but not made a pass till *A.* had drawn also, manslaughter. *Ibid.*]

[If *A.* comes home drunk, his father orders him to bed, he refuses, a scuffle ensues, *B.* another son gets out of bed, throws *A.* on the ground, beats him, and *A.* in the strife wounds *B.* with a penknife, and he dies, it is manslaughter. *Foster, 278.*]

[If on words arising in the street, a woman strikes a man in the face with an iron patten, and draws much blood, and he gives her a blow on the breast with the pommel of his sword; she flies, he pursues and stabs her in the back; it is manslaughter. *Stedman's Case, Foster, 292. Vide 5 Burr. 2794.*]

[Two boys fight, the one who is worsted runs to his father all bloody, the father takes a staff, runs three quarters of a mile and beats the other boy who dies of the beating; this has been held only manslaughter. *Vide Foster, 294.*

(M 17.) *Upon an unjustifiable act.*] Upon an act not justifiable, tho' done without a mischievous intent; as, if a person in wrestling kills another. *H. P. C. 57.*

Or, in play at foils. *Ibid. R. Al. 12.*

Or, at hand-sword, without the king's command. *H. P. C. 32.*

Or, in justing, without the king's licence. (*Vide 3 Inst. 56.*)

If a man, shooting or throwing stones into an highway, kills another. *H. P. C. 32. 44. 58.*

Or, shooting at a deer in a park. *H. P. C. 31. 3 Inst. 56.*

Or, rides a wild horse among a concourse of people. *H. P. C. 44.*

Or, whips a horse in the street to make him run speedily, whereby a child is killed. *H. P. C. 58.*

[Or, if a man duped and encouraged by a concourse of people, throw a pick-pocket into a pond adjoining to the road, to revenge the theft

theft by ducking him, but without any apparent intention to the away his life, and the pick-pocket be drowned. *Old Bailey*, 1785, *Leach's Notes to Hawkins*, vol. 1. 125.]

## (M 18.) Homicide.

Homicide is excusable, when done upon inevitable necessity; as, for one's own defence; for if a man be assaulted and retreats to a wall, and then in his defence kills the pursuer, it is not murder, nor manslaughter. *H. P. C.* 41. And this by the *st. Glo.* 9. 2 *Inst.* 315. 3 *Inst.* 56.

So, if he retreat, when he can, without danger of his life.

Or, till he fall down. *H. P. C.* 41.

Or, if he does not retreat, where the pursuit is so fierce that there cannot be a retreat with safety of life. *H. P. C.* 41. 3 *Inst.* 56.

Tho' there was malice between the assailant and the person who killed him in his own defence. *H. P. C.* 42.

But if a man strikes the assailant before retreat, and then kills him in his own defence, this is manslaughter. *H. P. C.* 42.

(M 19.) *By chance-medley.*] Or, when done by misadventure: as, where a man does a lawful act without a bad intent, and death ensues. *H. P. C.* 31. By the *st.* 52 *H. 6.* 26 *de Marl.* 2 *Inst.* 148. 315.

As, if a man be shooting at rovers, or at a bird, and by chance kills another. *H. P. C.* 31. 3 *Inst.* 56.

[It is only an act *malum in se*, not barely *malum prohibitum*, that prevents the death being chance-medley; thus, an *unqualified* person shooting at game, falls under the same rule as if *qualified*. *Foster*, 259.]

Or, cutting wood, and the ax-head flies off and kills. *H. P. C.* 31.

Or, justing by the king's command. *H. P. C.* 31.

If a father corrects his son, and by accident kills him. *H. P. C.* 31.

Or, a master gives proper correction to his scholar. *H. P. C.* 31.

Or, to his servant. *H. P. C.* 31.

[If parent or master correcting with *dangerous* weapon, kill, it is murder; with *improper*, but not likely to kill, as a cudgel, manslaughter: if with a *proper* instrument, and *due moderation*, accidental death. *Foster*, 262.]

If a thief breaks an house in the night, and *A.* rises and finds a stranger there by consent of a servant, but not of the master, hiding himself, and supposing him to be the thief, kills him with his sword. *R. Mar.* 5.

[If death ensues from an accident, happening at innocent and allowable recreations, as cudgels, foils, wrestling, engaged in by mutual consent in friendship, for trial of skill or manhood, or improvement in the use of weapons, it is chance-medley. *Foster*, 259.]

[This extends not to prize-fighting, or public boxing-matches for lucre; nor to throwing at cocks. *Foster*, 260, 261.]

[If workman throwing rubbish out of a house, kills; if he gave warning, accidental death; if not, manslaughter at least. *Foster*, 262.]

[If in *London*, or populous towns, such warning not sufficient, unless early, and when few people are stirring. *Foster*, 263.]

[If



[If a man driving a cart, &c. kills; if he saw the danger, murder; if he did not, thro' heedlessness, manslaughter; if he took all due care, accidental death. *Foster*, 263.]

[If a man finds a pistol, tries it with the rammer, and thinks it unloaded, carries it home, shews it his wife, touches the trigger, it goes off, and kills her, ruled manslaughter; yet ought to have been only accidental death. *Per Holt C. J.* and *Foster J.* *Ibid.*]

[If a man goes with his wife on a Sunday, to dine at a friend's house, carries a gun, in hopes of sport, discharges it before dinner, sets it in a private place in his friend's house, goes to church, returns home with his wife and neighbours, touches the trigger, and the gun having been loaded by another person while he was at church, kills his wife, he shall be acquitted. *Foster*, 265.]

[Death ensuing upon an act unlawful, cannot be accidental death; but if done deliberately, and with intention of mischief, murder; if heedlessly, manslaughter. *Foster*, 260, 261.]

(M 20.) *Justifiable.*] Or, when done by warrant of law, as, for the advancement of justice; as, if an officer put another to death pursuant to judgment. *H. P. C.* 35.

[If an officer, by warrant from the crown, beheads a man for felony, or a woman for treason. *Foster*, 268.]

If a champion in a writ of right kills another; or a combatant in an appeal. *H. P. C.* 37.

If a sheriff, bailiff, &c. having a warrant to arrest one indicted of felony, kill him, if he will not obey the arrest. *H. P. C.* 36. *Foster*, 318.

So, a person, who pursues upon an hue and cry. *H. P. C.* 36.

So, if a person arrested for felony, when a felony is done, escapes from his conductors to gaol, and they cannot retake him without killing him. *H. P. C.* 36.

[If felony is committed, or a dangerous wound given, and the felon flies, and cannot be otherwise taken, and is killed by any person. *Foster*, 271.]

If rioters, &c. oppose a lawful warrant of a justice, and one of them is killed. *H. P. C.* 37.

[If on a sudden affray, tho' no felony committed or wound given, one interposes to part the combatants, giving notice of his intention, and is assaulted by them, or either of them, and kills. *Foster*, 272.]

So, in civil process, if the party resist, the sheriff, &c. may kill him without retreating. *H. P. C.* 37. 3 *Inst.* 56.

Or, if in the arrest the sheriff kill him, it is not felony. *H. P. C.* 37. 3 *Inst.* 56.

In an officer, in pursuit of transporters of wool, after resistance, kills one of them. 3 *Mod.* 66.

If a prisoner assaults his gaoler, the gaoler may kill him. *H. P. C.* 37. 3 *Inst.* 56.

If hunters in a park fly or resist, the parker may kill them. *H. P. C.* 37. By the *st.* 21 *Ed.* 1. *de malefactoribus in parcis.*

So, a man may kill a thief who attempts to rob him upon the highway, or in his house. *H. P. C.* 39. Declared by the *st.* 24 *H.* 8. 5. 3 *Inst.* 56.

And a woman him that attempts to ravish her. *H. P. C.* 39.

Or,

Or, a man, who attempts burning an house. *H. P. C.* 39.

[If a man by violence or surprise endeavours to commit a felony on the person, habitation, or property of another, he may repel force with force, is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if in a conflict between them he happens to kill, it is justifiable. *Foster*, 273. *Stat.* 24 *H.* 8. c. 5.]

[Or, a servant or by-stander may interpose, and if death ensues, is justified. *Foster*, 274.]

Otherwise, if he attempt only a battery. *H. P. C.* 40.

Or, if the parker, &c. had malice. By the *st.* 21 *Ed.* 1. *de malefactoribus in parcis.*

In these cases the party shall be arraigned, and upon the special matter found, if it be *se defendendo*, or chance-medley, he forfeits his goods, but he shall have a pardon of course. *H. P. C.* 32. 40.

If it be justifiable homicide, he shall be dismissed without forfeiture, or pardon. *H. P. C.* 38.

[In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him, for the law presumes the fact to have been founded in malice unless the contrary appear. *Foster*, 255.]

## (N) Misprision.

### (N 1.) Of Treason.

**A**LL treason includes misprision. *H. P. C.* 127. 3 *Inst.* 36.

By the *st.* 5 *Ed.* 6. 11. concealment of treason shall be only misprision. So, by the *st.* 1 & 2 *Ph.* & *M.* 10. 3 *Inst.* 36.

The concealment is misprision, tho' the treason be made so by statute. *H. P. C.* 127. *R. Kelg*, 21.

If one knows a counterfeiter of the coin, and does not discover him, that is a misprision. *H. P. C.* 128.

By the *st.* 13 *El.* 2. concealment of bulls, &c. from *Rome*, is misprision of treason.

By the *st.* 14 *El.* 3. to counterfeit coin not of this realm, nor current here, is misprision of treason.

If *A.* be informed of a design and of the persons, it will be misprision, tho' he says generally, that there is a plot, &c. for he ought to discover all that he knows of the design. *Kelg*, 22.

And he ought to discover it to a privy councillor, or a justice of peace. *Semb. Kelg*, 22. *H. P. C.* 127. 3 *Inst.* 36.

[Compassings or imaginations against the king by words without an overt act, is high misprision. 3 *Inst.* 140.]

But the receiver of a traitor knowingly, if he comforts him, is a traitor. *H. P. C.* 127. 3 *Inst.* 138. But he may be indicted for misprision only. 1 *H. H. P. C.* 374.

So, knowledge of treason, and assent, make a traitor. *H. P. C.* 127.

Or, approbation. *Kelg*, 21.

Yet, concealment of a fact, not treason, is not misprision. *Kelg*, 33.

So,

So, a man cannot be guilty of misprision, without knowing the design and the persons. *Kele*, 21, 22.

One convicted of misprision of treason forfeits his goods, his land for life, and shall be imprisoned for life. *H. P. C.* 128. 3 *Inst.* 36.

(N 2.) Of Felony.

All felony includes misprision. 3 *Inst.* 140.

Misprision of felony is, when a man conceals the felony. *H. P. C.* 129. 3 *Inst.* 139.

Or, if he procures the concealment. *H. P. C.* 129.

[Concealment of felonies in sheriffs or bailiffs of liberties is more severely punished than in others, viz. by imprisonment for one year, and ransom at the king's will. In a common person imprisonment for a less discretionary time and ransom at the king's will. 3 *Inst.* 139.

[Misprision of felony is incidental to a felony created by statute as well as to one at common law. 1 *H. H. P. C.* 652. 708.]

[Silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision. 1 *H. H. P. C.* 431. 448. 533. 2 *H. H. P. C.* 75.]

[So, the concealment of treasure-trove is a misprision punishable by fine and imprisonment. 3 *Inst.* 133.]

(N 3.) Other Misprisions.

If a man strikes in *Westminster-Hall*, *sedente curia*, it is a great misprision, for which he shall lose his hand, his goods, the profits of his land for life, and shall have perpetual imprisonment. *H. P. C.* 13. 3 *Inst.* 140.

So, if he rescues a prisoner from the bar of the court of *Chancery*, *B. R.*, *C. B.*, or *Exchequer*. *H. P. C.* 131. *Vide* 3 *Inst.* 141.

So, if in the presence of the same courts, or of justices of assize, or *oyer* and *terminer*, a man draws his sword and strikes another. *H. P. C.* 132. 3 *Inst.* 140.

Or, draws upon a judge, tho' he does not strike him. *H. P. C.* 132. 3 *Inst.* 140.

By the *st.* 33 *H. 8.* 12. if a man strikes in the king's palace and draws blood, he shall lose his hand, and suffer fine and ransom and perpetual imprisonment. (*Vide* 3 *Inst.* 140.)

If one utters coin, knowing it to be counterfeit, it is a great misprision, for which he shall be fined and imprisoned. *H. P. C.* 20. 128.

So, if one of a grand inquest discovers the person indicted, or the evidence against him. *H. P. C.* 131.

Or, if a man dissuades another from giving evidence against a felon. *Ibid.*

So, if a man reproaches a judge. *Ibid.* 3 *Inst.* 142.

Or, assaults the attorney of the adverse party. *H. P. C.* 131.

Or, abuses a juror, who gives a verdict against him. *Ibid.*

(*Vide Contempt, Misdemeanor.*)

As to Praemunire.

*Vide Title Praemunire.*



## (O) Felony to Goods.

(O 1.) Robbery, what.

(O 1.) *A violent* **R**obbery is a felonious and violent taking of money *taking.* or goods of any value, from the person of a man, putting him in fear. *H. P. C. 71. 3 Inst. 68.*

The indictment says, *violenter & felonice cepit a personâ, &c. in terrorem*, and therefore differs from an indictment of a cut-purse, which says, *clam & secretè à personâ.* *H. P. C. 71. 74, 75. 3 Inst. 68, 69.*

[But it is not necessary that the fact of actual fear should either be laid in the indictment, or proved on the trial; it is sufficient if the offence be charged *violenter et contra voluntatem.* It is sufficient if such circumstances appear on the evidence, as are likely to induce a man to part with his property. *Foster, 128.*]

If a robber, by terror, prevails with a person to deliver his money and takes it, it is a violent taking.

[Or, if he pull an ear-ring from a lady's ear.] *H. P. C. 72. 3 Inst. 68.*

[Or, if an officer feloniously take money from a prisoner, not to take him to gaol, under colour of authority.]

[Or, obtain property by threatening to accuse another of an unnatural crime. *Leach's Notes on 1 Hawk. 149.*]

So, if he compels him to swear to fetch him money, which the robber receives. *H. P. C. 72. 3 Inst. 68.*

Tho' he has no weapon drawn to terrify. *H. P. C. 72.*

If he cuts a girdle, by which a purse falls to the ground, and the robber takes it up, it is a violent taking. *H. P. C. 72. 3 Inst. 69.*

Tho', upon seeing a small sum in it, he re-delivers it. *H. P. C. 72.*

Or, lets it fall and does not take it up again. *H. P. C. 72. 3 Inst. 69.*

[Or, has possession of it in the smallest degree, tho' the party robbed recover it, as where *A.* laid hold of the watch-chain of *B.* and by a jerk removed the watch from the fob, tho' *B.* caught it immediately, and kept it.]

But if he takes nothing, tho' he assaults to rob, it is no robbery. *H. P. C. 71.*

[By the *st. 7 Geo. 2. 21.* he shall be adjudged guilty of felony, and transported for seven years.]

Tho' he cuts the girdle, and the purse falls to the ground, if he does not take it up. *H. P. C. 72. 2 Inst. 69.*

All aiding, or in company to rob, are principals, tho' only one takes it. *H. P. C. 72.*

If several come to rob *A.* who escapes; and afterwards one of them rides from the others, and out of their presence, and without their privity, robs and returns to the company, are all guilty. *H. P. C. 72.*

[If *A., B., C.,* and *D.,* in order to get the reward, agree that *E.* shall procure a person to rob *D.,* and *E.* procures *F.,* and they two take money and goods from *D.,* it is not a robbery; for it cannot be said they were taken against his will. *M<sup>d</sup> Daniel's Case, 1755, Foster, 121.*]

[Yet, if *A.* in order to apprehend a highwayman goes out in a chaise, and when the highwayman comes up and demands his money, gives

gives it him, and then seizes him, it is a robbery. *Nordon's Case, Foster, 129.*

A taking in my presence is a taking from my person. *H. P. C. 73. 3 Inst. 69.*

[Taking in the presence is taking from the person; but in a special verdict it must be *expressly* found that the party robbed was present at the taking up, otherwise only grand larceny. *Rex v. Francis, P. 8 Geo. 2. Str. 1015. B. R. H. 113. Com. 478. S. C.*]

Taking beasts out of a pasture in my presence, after terror done to me by an assault or violence, is robbery. *H. P. C. 73. 3 Inst. 69.*

If a man being assaulted to be robbed, throws his money into a ditch, and the robber takes it. *H. P. C. 73. 3 Inst. 69.*

Or, if he drops his hat, and the robber takes it. *H. P. C. 73.*

(O 3.) *Any value.*] Tho' the value be under twelve-pence. *H. P. C. 73. 3 Inst. 69.*

Or, only one penny. *3 Inst. 69.*

*Vide post. (Y 8.)*

#### (O 4.) Larceny, what.

Larceny is a felonious taking of the personal goods of another. *H. P. C. 60. 3 Inst. 107.*

If it be above the value of twelve-pence, it is grand larceny. *H. P. C. 69.*

If under that value, it is only petit larceny. *H. P. C. 70. 75.*

So, if of the value of twelve-pence. *2 Rol. 78. H. P. C. 70.*

[Larceny is also simple or mixed: simple larceny is a felonious taking and carrying away of the mere personal goods of another, not from his person nor out of his house: mixed larceny is such as has all the properties of the other, but accompanied with either one or both of the aggravations of a taking from one's house or person. *1 Hawk. 134. 4 Bl. Com. 239.*]

Grand larceny may be committed by a taking *clam & secretè à personâ*; as, by picking a pocket, cutting a purse. *H. P. C. 75.*

And the indictment for this must say, *clam & secretè*; for if it does not appear, by the indictment or verdict of the jury, to be *clam & secretè à personâ*, it does not differ from common larceny. *H. P. C. 75.*

Or, it may be committed in a man's habitation. *H. P. C. 76. 3 Inst. 108. Vide post. (P 2, &c.)*

Or, at large, without regard to the person or habitation of any. *H. P. C. 60. 3 Inst. 107.*

(O 5.) *Who may commit it.*] An infant not of the age of discretion, viz. fourteen years, may commit larceny. *H. P. C. 65. [Vide 3 Inst. 108. cont.]*

But it is prudent to respite the judgment. *H. P. C. 65.*

A woman by her own act may commit it, tho' covert. *H. P. C. 65. 3 Inst. 108.*

And the command of her husband does not excuse her. *H. P. C. 66.*

But the coercion of her husband excuses her; but not in murder. *H. P. C. 65. 3 Inst. 108.*

And if done in company with her husband, it shall be intended by his coercion. *H. P. C. 65.*

Tho' she commits burglary. *R. Kelg, 31.*

Yet, the coercion of a master does not excuse the servant. *H. P. C. 66.*

And if the woman cannot prove her marriage, it does not excuse her. *R. Kelg, 37.*

(O 6.) *What is a felonious taking.*] The indictment shall say, *cepit*; for, *felonice abduxit*, is not sufficient. *H. P. C. 61.*

If a man steals my horse, and *A.* steals it from him; *A.* may be indicted for a felonious taking from me. *H. P. C. 64.*

If a man takes a woman with the goods of her husband against her will, it is felony. *H. P. C. 64.*

If *A.* kills my sheep and takes only the skins, it is felony. *H. P. C. 64.*

Or, the wool. *H. P. C. 64.*

If a man takes a horse by colour of a *replevin*. *H. P. C. 63. 3 Inst. 108.*

If he takes any thing out of a trunk and lays it on the floor, but being surprised leaves it there. *R. Kelg, 31.* for by such taking he had the possession.

Tho' the bare use was permitted to him: as, a guest steals plate brought for his use. *H. P. C. 61. 3 Inst. 108.*

Or, sheets from his bed. *H. P. C. 64. 3 Inst. 108.*

Or, tho' the bare charge was committed to him; as, if a butler steals plate committed to his charge. *H. P. C. 61. 3 Inst. 108.*

Or, a shepherd, sheep. *H. P. C. 61. 3 Inst. 108.*

[Or, where a clerk to a banker or merchant has the care of money, or has access to it for special purposes, and he clandestinely converts some of it to his own use: or, if a servant sent to a library for one book and he takes another, or being sent for a hat or sword and he steals a cane. *O. B. 1784.*]

[So, where a person being left in the care of chambers pawns the property left to his care with a design to steal it. *O. B. 1786, 1 Hawk. 136. Leach's notes.*]

Or, tho' the thief be apprehended before the goods removed: as, if a guest carries sheets down stairs *animo furandi*, but is apprehended before he gets out. *H. P. C. 64. 3 Inst. 108.*

If a man steals an horse, but is taken before he gets out of the pasture. *H. P. C. 64. 3 Inst. 109.*

If several come with an intent to steal, and one of them takes goods, they are all felons. *Per Kelg, 47.*

But it is not felony, if a man finds goods and converts them *animo furandi*. *H. P. C. 61.*

Or, if a wife delivers them to him, without the assent of the husband. *H. P. C. 64. Sho. 52.*

Or, if he obtain them by false token, or counterfeit letter. *Vide the ff. 33. H. 8. 1.*

So, if possession was delivered: as, if *A.* lend an horse to a stranger who never returns with it, it is no felony. *H. P. C. 61.*

if



If a clothier deliver yarn to a weaver, who imbezils or runs away with it. *H. P. C.* 61, 62.

If a carrier carry away goods delivered to him. *H. P. C.* 61.

If a goldsmith imbezil plate committed to him to be wrought. *Sbo.* 52.

If a woman hire a room furnished, and afterwards carry away the furniture. *Sbo.* 54. *R. Kelg.* 24. *14 Car.* 2.

[But by *§. 3 & 4 W. & M. c. 9.* whoever shall take away with intent to steal, imbezil or purloin any chattel, bedding or furniture, which by contract or agreement they are to use in any lodging let to them, shall be guilty of felony.]

[A wife cannot be found guilty with her husband on this statute, for she is under coercion; nor with the husband, if it should appear that the lodgings were let to him, or if they were let jointly to both, for it shall be construed the act of the husband only. *1 Hawk.* 137. *Leach's Notes.*]

Yet, if the privity be determined upon which the delivery was made, it is felony: as, if the carrier open a pack or trunk and take the goods out. *H. P. C.* 62.

Or, if he carry them to the place appointed, and afterwards steal them. *Ibid.*

If a throwster delivers filk to a workman in his house to be worked, and he steals it; for the whole property remained in the owner. *R.* 1664, *Kelg.* 35.

[Or, if the felonious design was formed before the delivery of the goods: as, where a man having feloniously obtained the delivery of a bill of exchange under the fraudulent design of discounting it, converted it to his own use; and it appearing on the evidence that the owner never meant to part with the possession, it was held to be felony. *O. B.* 1784, *p.* 294.]

[So, where a horse was obtained with the same design under pretence of trying its paces. *O. B.* 1779, 1784.]

[So, to obtain the delivery of money, on the false pretence of having found a ring of great value. So, to obtain the delivery of goods under pretence of purchasing them, and then run away with them. *Ray.* 276.]

[So, where the delivery of the property is made for a certain special purpose the possession is still supposed to reside in the first proprietor: as, where a master delivers goods to his servant to carry to a customer, who on his way converts them to his own use, this is a felonious taking. *O. B.* 1782, *1 Hawk.* 135. *Leach's Notes.*]

And by the *§. 21 H. 8. 7.* if a servant imbezil or go away (of intent to steal) with any money, or goods entrusted with him to the value of forty shillings, it is felony. Provided not to reach an apprentice, or one under eighteen.

If goods are delivered to a servant by another servant, it is within the statute. *H. P. C.* 62.

But if the servant waste or consume, &c. it is not within the statute. *H. P. C.* 63.

Or, if he receive rent for his master and run away with it. *H. P. C.* 63.

Or, if the master deliver beasts to him to sell, and he runs away with the money after the sale. *H. P. C.* 63.

Or,

Or, if he deliver an obligation to him, and he receives the money due, and departs. *H. P. C. 63.*

Or, if he departs with the obligation itself. *H. P. C. 63.* [*Vide 1 Hawk. 140. sec. 15.*]

[If any officer or servant of the bank of *England*, being entrusted with any note or bill, &c. belonging to the said company, or having any bill, &c. of any other person lodged, &c. shall secrete, &c. the same, he shall suffer death without benefit of clergy. 15 G. 2. c. 13. s. 12.]

[If any deputy clerk, &c. or any other person employed in receiving, &c. letters or packets, or in any other business relating to the post-office, shall secrete, &c. any letter, &c. with which he shall be entrusted or which shall have come to his possession, containing any bank note, &c. or shall steal or take any of the same out of any letter or packet that shall come to his possession, he shall suffer death without benefit of clergy. 5 Geo. 3. c. 25. s. 17. & 7 Geo. 3. c. 50. *Vide 1 Hawk. 140. Vide 24 Geo. 2. c. 11.* a similar law with respect to the officers and servants of the *South-Sea Company*.]

Or, if he does not continue servant at the time of the delivery, and the running away with the goods. *H. P. C. 63.*

(O 7.) *What goods.*] If a man take feloniously any moveable goods of another, it is felony.

Tho' he had but a special property, as bailiff. *H. P. C. 67. 3 Inst. 110.*

Cloth in the hands of a taylor. *H. P. C. 67.*

Goods in the hands of a carrier. *R. Kelz, 39.*

Tho' the owner himself take them, with intent to charge the bailee, &c. for them. *H. P. C. 67.*

Tho' the owner be uncertain: for he may be indicted, *quare bona mortui, bona ignoti, &c.* *H. P. C. 67.*

So, *quare bona capelle, or parochianorum*, if he takes the goods of a church or chapel, in the time of vacation. *H. P. C. 67. 3 Inst. 110.*

So, if he takes a shroud from a person buried, he shall be indicted, *quare bona excutorum.* *H. P. C. 67. 3 Inst. 110.*

Tho' the things taken be *fera natura, si sint domui aut manui assuet.*, and the thief knows them to be tame. *H. P. C. 68.*

As, if he take a deer, coney, crane, partridge or pheasant, which he knows to be tame. *H. P. C. 68. 3 Inst. 110.*

Or, a swan marked and pinioned. *H. P. C. 68.*

Or, not marked, if it be tame in a moat, pond, or private river. *H. P. C. 68.*

An hawk reclaimed. *H. P. C. 66. 3 Inst. 109.*

And by the st. 37 Ed. 3. 19. if he steal any hawk, &c. and does not proclaim it. *3 Inst. 97.*

So, if they be restrained of their natural liberty *ratione impotentia*, as, young hawks, and young pigeons in the nest. *H. P. C. 68.*

*Vel ratione loci*; as, old pigeons in a dove-house. *H. P. C. 68.*

Fish in a net, trunk, or separate pond. *H. P. C. 67. 3 Inst. 109.*

But there can be no felony of things *fera natura*, tho' privileged *ratione loci*; as deer, conies, in a park, warren, or inclosure. *H. P. C. 68.*

[But

[But now, to hunt, wound, kill, or steal any deer, to rob a warren; or to steal fish from a river or pond, (being in these cases armed and disguised,) also to hunt, wound, kill, or steal any deer in the king's forests or chases inclosed, or in any other inclosed place where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act; all these are made felonies without benefit of clergy by 9 Geo. c. 22.]

[And every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer in any forest, chase, purlieu, or antient walk, or in any inclosed, park, paddock, wood, or other ground where deer are usually kept, shall forfeit the sum of 20*l.*, or for every deer actually killed, wounded, or destroyed, taken in any toil or snare, or carried away, the sum of 30*l.*, or double those sums, if the offender be a keeper; and on a second offence (whether of the same or of a different species) shall be guilty of felony, and be transported for seven years. 16 Geo. 3. c. 30. *f.* 1.]

[And all persons armed with offensive weapons, who shall come into such places with an *intent* to commit any of the said offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody shall be transported for seven years. *f.* 9.]

[And persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard; and their receivers, aiders, and abettors, shall be transported for seven years. 5 Geo. 3. c. 14. *f.* 1.]

[But the indictment must be preferred within six months after the offence committed.]

[And persons convicted of entering warrens in the night time, and taking and killing conies there, their aiders and abettors, may be punished by transportation, or by whipping, fine, or imprisonment. *f.* 6.]

Nor, of things reclaimed or tame, when they regain their natural wildness. *Vide Biens* (F).

So, an indictment, *quare bona* B. where they are the goods of another, will be bad, and the defendant acquitted.

So, if it be, for goods of the marquis of B. where he is only the eldest son of a duke. *R. Sal.* 451.

Nor, of things of a base nature, tho' tame; as bears, foxes, monkeys, ferrets, or their whelps. *H. P. C.* 66. 3 *Inst.* 109.

Tho' *domita natura*; as, a mastiff, or other dog. *H. P. C.* 66. 3 *Inst.* 109.

Nor, of things real, or annexed to the realty; as, of corn, or grass growing, apples on trees. *H. P. C.* 66. 3 *Inst.* 109.

[To steal, damage, or destroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to steal or otherwise destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots, or the roots of madder when growing, are punishable criminally, by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. Statutes 43 *El.* c. 7. 15 *Car.* 2. c. 2. 31 *Geo.* 2. c. 35. 6 *Geo.* 3. c. 48. 9 *Geo.* 3. c. 41. 13 *Geo.* 3. c. 32.]

[To steal by night any trees or roots, shrubs or plants, to the value of 5*s.*, felony in the principals, aiders, and abettors, and in the purchasers thereof, knowing the same to be stolen. 6 *G.* 3. c. 36.]



[By *ft.* 6 G. 3. *c.* 48. and 13 G. 3. *c.* 33. to steal any timber trees therein specified, and any root, shrub, or plant, by day or night, is liable to pecuniary penalties for the two first offences, and for the third is constituted a felony liable to transportation for seven years.]

Lead taken from a church. *H. P. C.* 66.

[But now, to steal or rip, cut or break with intent to steal, any lead or iron bar, rail, gate, or palisado, fixed to a dwelling-house or out-house, in any court or garden thereto belonging, or to any other building, is made felony liable to transportation for seven years, by *ft.* 4 Geo. 2. *c.* 32.]

[Stealing ore out of mines of black lead, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment, or to return from such transportation, is felony without benefit of clergy, by *ft.* 25 Geo. 2. *c.* 10. Receivers liable to the penalties of receivers of stolen goods.]

Otherwise, if left there after severance, and at another time removed. *H. P. C.* 66. 3 *Inst.* 109.

Nor, of a copper fixed to an house. *R.* 1664. *Kelg.* 29.

Nor, taking an infant in ward. *H. P. C.* 66. 3 *Inst.* 109.

Nor, a chest with charters, tho' the chest be above the value of 12*d.* *Ibid.*

[Stealing a commission to settle boundaries, out of the six clerks' office, is not felony; and on indictment for it the prisoner shall be discharged. *Rex v. Westbeer*, T. 13 Geo. 2. *Str.* 1133.]

Stealing an obligation is no felony at common law; for it is a *chose en action*. *H. P. C.* 67.

[But now, to steal bills of exchange, bonds, and promissory notes, &c. shall be the same offence as stealing the money they were meant to secure. 2 Geo. 2. *c.* 25. *f.* 3. 31 Geo. 2. *c.* 22. *f.* 78.]

Nor, of things which are *nullius in bonis*; as, treasure-trove, wreck, waife, or stray before seizure. *H. P. C.* 67. 3 *Inst.* 108.

[But now, by *ft.* 26 Geo. 2. *c.* 19. to plunder or steal from any ship in distress (whether wreck or no wreck) is felony without benefit of clergy.]

(O 8.) *What value.*] If a man be indicted in the same indictment for taking of 4*d.* at one time and 10*d.* at another from the same person, this is grand larceny. *H. P. C.* 70.

[But it has been determined that the value of the property stolen must not only be in the whole of such an amount as the law requires to constitute a capital offence, but the stealing must be to that amount, at one and the same time. 1 *Hawk.* 145. *Leach's Notes.*]

If two take goods to the value of 13*d.* it is grand larceny in both. *H. P. C.* 70.

But tho' goods are valued in the indictment at 10*s.* the jury may find specially guilty to the value of 10*d.* and that will be petit larceny. *Ibid.*

*Vide post.* (Y 9, 10.)

(P) Felony to the Habitation.

(P 1.) Arson.

**ARSON** was felony by the common law, when a man maliciously burnt the house of another. *H. P. C. 85. 3 Inst. 66.*

The indictment need say only *domum*. *H. P. C. 86. 3 Inst. 67.*

When a man burns a mansion-house, it is felony. *H. P. C. 86. 3 Inst. 67.*

Or, a stable, mill-house, sheep-house, barn, parcel of the mansion. *H. P. C. 86. 3 Inst. 67.*

Or, a barn with corn or hay, tho' it be not parcel of the mansion. *H. P. C. 86. 3 Inst. 67.*

Tho' he intended the house of another; and he may be indicted, *quod ex malitiâ præcogitatâ combussit domum* C. tho' the house of B. was designed. *H. P. C. 85. 3 Inst. 67.*

Tho' only part of the house was burnt. *H. P. C. 85. 3 Inst. 66.*

By the *st. 22 & 23 Car. 2. 7.* it shall be felony, if in the night with malice any burn stacks of corn or hay, buildings, kilns, &c.

[And by *9 Geo. 1. c. 22.* to burn any house, barn, or out-house, or any hovel, cock, mow, or stack of corn, straw, hay, or wood, or to rescue an offender, is felony without clergy.]

[A prison, the entrance to which is thro' a dwelling-house, is within this act. *Donevan's Case, Black. 682.*]

[Setting fire to a parcel of unthreshed wheat is not a felony within this statute. *Rex v. Judd, H. 28 Geo. 3. 2 T. R. 255.*]

But setting fire, if no part of the house is burnt, is not felony. *H. P. C. 85. 3 Inst. 66.*

Or, burning of his own house, with intent to burn the house of another, if it be not burnt. *H. P. C. 85.*

[A pauper setting fire to and burning the parish work-house, has lately been held guilty of arson. *1 Hawk. 166. Leach's Notes.*]

[If A. being entitled to dower out of a house, but no dower assigned, and having the care of her son who has the equity of redemption in it, subject to a mortgage-term, lets it to B. and receives the rent, and orders her daughter C. to set fire to it, and goes from home, and C. does it, they are both guilty. *Harris's Case, 1753, Foster, 113.*]

[If a man seised of the freehold and inheritance of a house, of which another is in possession under a lease, burns it, he is guilty. *Ibid.*]

*Vide post. (Y 6.)*

(P 2.) Burglary.

(P 2.) *If one in the night.*] Burglary is, when a man *noctanter* breaks and enters a mansion-house of another, with a felonious intent. *H. P. C. 79. 3 Inst. 63.*

*Noctanter* is said, when the face of a man cannot be distinguished. *H. P. C. 79. 3 Inst. 63. [See 1 Hawk. 160.]*

So, by the *st. 12 Ann. 7.* if he enter by day, or night, with intent to commit felony, or commit felony and break the house in the night to get out, it is burglary.

(P 3.) *Breaks.*] If a man actually breaks a mansion-house he commits burglary. *H. P. C. 80. 3 Inst. 64.*

So, if he breaks the window. *H. P. C. 80. 3 Inst. 64.*

[If a man cuts a hole in the window-shutter, and puts in his hand and takes out goods. *Gibbons's Case, 1752, Foster, 107.*

*Breaks the wall. H. P. C. 80.*

*Unlocks the door. H. P. C. 80.*

*Or, draws the latch. H. P. C. 80.*

So, if he, being within the mansion-house, draws the latch and enters a chamber. *H. P. C. 82. R. v. Gray, M. 8 Geo. 1. Str. 481.*

If the thief enters by the open door and *A.* retreats to a chamber, into which the thief breaks. *H. P. C. 81.*

[If he has broken into the house, and taken goods from one room to another, in order to carry them off, but is apprehended in the house. *Foster, 107.*]

[Breaking open a chest, or a cupboard let into the wall, is not burglary at common law. *Ibid.*]

If he enters by the open door, and after stealing goods, breaks the house to get out. *H. P. C. 81. [12 Ann. c. 7.]*

If he comes down the chimney. *H. P. C. 81.*

If a servant opens the window to let him in. *H. P. C. 81.*

[If a servant lets in a thief at the street-door, and lets him out, tho' he does not go out with him, it is burglary in both. *Per all the Judges. Cornwall's Case, M. 4 Geo. 2. Str. 881.*]

If the thief makes hue and cry, brings a constable to whom the owner opens the door, and then the thief enters. *H. P. C. 81. Kelg, 44. 3 Inst. 64.*

If one breaks, &c. and the others watch in the street, all are burglars. *H. P. C. 81. 3 Inst. 64.*

If a thief in the night comes to rob, and finding the door locked pretends to speak with the owner, and upon such pretence the servant opens the door and the thief enters and robs. *R. Le Mott, Kelg, 42.*

If by fraud he has a judgment in ejectment, and arrests the party in a false action, and then enters and robs. *R. Farr, 1665. Kelg, 43.*

But if the thief enters by the open door and gets out so, it is no burglary. *H. P. C. 81.*

Or, if he enters by a hole made in the wall before. *H. P. C. 82.*

Or, if he assaults the house, and the owner throws out his money. *H. P. C. 81.*

(P 4.) *And enters.*] An entry is necessary; but if he steps within the house, it is an entry. *H. P. C. 80. 3 Inst. 64.*

Or, if he puts his hand or foot within the door or window. *H. P. C. 80. 3 Inst. 64.*

Or, an hook, or pistol. *H. P. C. 80. 3 Inst. 64.*

[But it seems the instrument must be introduced for the purpose of committing the felony: thus where thieves having bored a hole through the door with a centerbit, and part of the chips were found in the inside of the house, yet, as they had neither got in the mselves nor introduced a hand or instrument for the purpose of taking the property, the entering was ruled incomplete. *O. B. 1785, Leach's Notes to 1 Hawk. 162.*]



So, if he turns the key of a door locked on the inside. *H. P. C. 80.*

(P 5.) *A mansion-house.*] The indictment must say, *domum mansiona-lem.* *H. P. C. 86. 3 Inst. 64.*

A church is a mansion-house. *H. P. C. 82. 3 Inst. 64.*

So, a shop. *H. P. C. 83. 3 Inst. 64.*

So, a chamber within the inns of court, if it be inhabited. *H. P. C. 83.*

[If several persons dwell in one house, without having any distinct interest in any part of it, the offence must be laid in the house of the proprietor whether he reside there or not.]

[But if a house be divided into several distinct tenements, and the owner do not reside there, the offence may be laid in the mansion-house of the party in whose apartments the burglary is committed; yet, in the case of distinct tenements where the owner himself resides in the house, unless each tenement have a separate outer door, it is said the offence must be laid in *his* mansion-house. *1 Hawk. 163. and Leach's Notes.*]

By the *st. 5 Ed. 6. 9.* a booth, or tent in a fair, or market in which any then remains.

An house, from which all are occasionally absent. *H. P. C. 82. 3 Inst. 64.*

So, if a man inhabits sometimes in one house sometimes in another, both are mansion-houses. *H. P. C. 82. Kelg, 52.*

[Where the owner quits the house *animo revertendi*, it may be considered as his mansion-house, tho' no person is in it, but there must be an intention of returning, or burglary cannot be committed. *Nuthrown's Case, 1750, Foster, 76.*]

If a woman hires an house, and lives separate from her husband, and the lease being in the husband's name he refuses to have it, yet it shall be the mansion-house of the husband. *R. Kelg, 44.*

If a man hires an house for his habitation and removes his goods thither, and before he lodges there, the house is broke. *Dub. Kelg, 46.*

But a barn, or stable disjoined, at a distance from the house, are not mansion-houses at this day. *H. P. C. 82.*

Nor, a shop let to another, who works there by day, but does not abide there by night; for it is severed by lease from the mansion-house to which it is annexed. *H. P. C. 83.*

The indictment must say, *domum mansiona-lem domini regis*, if it be in a chamber in *Whitehall.* *Kelg, 27.*

*Domum mansiona-lem domina reginae*, and not of the possessor, if it be in a chamber in *Somerfet-house.* *R. Kelg, 27. Cowp. 8.*

(P 6.) *With a felonious intent.*] If the entry be with a felonious intent, it is burglary, tho' the intent be not executed; as, with intent to murder. *H. P. C. 82. 3 Inst. 65.*

Or, to commit a rape. *H. P. C. 83. R. 1664. Locost and Villars, Kelg, 30.*

[If a servant opens his lady's chamber-door fastened with a bolt, with an intent to commit a rape, it is burglary. *Rex v. Gray, M. 8 Geo. Str. 481.*]

But if a man enters and breaks a mansion-house with intent to commit a battery or trespass, it is no burglary. *H. P. C.* 83. 3 *Inst.* 65.

[A servant embezzled money intrusted to his care, left 10 guineas in his trunk, quitted his master's service, returned, broke, and entered the house in the night-time, and took away the 10 guineas; this was adjudged no burglary. *R. v. Bingley, O. B. Trin.* 3 *J.* 2. *M. S. Leach's Notes to 1 Hawk.* 164.]

If several men enter with intent to search for suspected persons and one of them steals, it is felony in him; but the others not being privy are not guilty. *Per Kelg,* 47.

Tho' they take soldiers, and without a constable, &c. break the house, which cannot be justified. *Per Kelg,* 47.

The indictment shall say, *burglariter.* *H. P. C.* 84. 3 *Inst.* 65.

*Vide post.* (Y 7.)

### (Q) Breaking of Prison.

*Vide Imprisonment,* (M 3.)—*Escape.*

### (R) Rescue of a Prisoner, and Escape.

**R**ESCUE of a felon out of prison, or custody, was felony at common law. 2 *Inst.* 589. *H. P. C.* 116. *Vide Rescous.*

Rescue of a traitor is treason. *H. P. C.* 116. 2 *Inst.* 590.

If *A.* takes a prisoner with him, out of the door of the place where prisoners stand for trial at the *Old Bailey*, it will be a rescue. *R. Kelg,* 45.

But there must be a felony committed. *H. P. C.* 116.

And a lawful commitment. *Ibid.*

And the principal ought to be attainted before the rescuer be arraigned. *H. P. C.* 116. [*Vide 1 H. P. C.* 598. 606. 624. 2 *v.* 254. 2 *Hawk.* 210. 215.]

[But in the case of treason, the rescuer may immediately be arraigned, because in high treason all are principals. 2 *Hawk.* 210.]

[This is, however, with great reason, denied by *Foster*, who observes, that tho' all are considered as principals, yet the guilt of the *constructive* principals depending on the establishment of that of the *actual* principal; the former ought not to be arraigned before the conviction of the latter, unless they be both in the same indictment when the acquittal of the *actual* principal will acquit the others of course.]

If the principal die before he be attainted, the rescuer shall only be fined and imprisoned. *H. P. C.* 116.

Or, if he prevent the arresting of a felon. *Ibid.* [1 *H. P. C.* 606. but *vide 2 Hawk.* 189. which seems *contra.*]

If there be a rescue of a person arrested at the suit of a common person, he shall have an action against the rescuer. *Vide Escape,* (B 1, &c.)

Or, if there be a rescue of a distress made. [*Vide 2 W. & M.* *st.* 1. c. 5.]

[To support an indictment, as for an offence of *breaking* the prison, an *actual breaking* must be laid; that *A.* *assisted* the prisoner to *escape*, is not sufficient. *Rex v. Burridge, M.* 1735, 3 *P. W.* 439.]

For

For a rescue, *rescussit*, or something equivalent, is necessary to shew it was against the gaoler's will. *Rex v. Burridge, M. 1735, 3 P. W. 439.*

[Assisting any prisoner to attempt his escape, tho' no escape was actually made, whether such prisoner be convicted or attainted of treason or any felony except petty larceny, or only committed for treason or any felony except petty larceny, expressed in the warrant of commitment, felony and transportation for 7 years. 16 Geo. 2. c. 31.]

[In case of petty larceny or other crime, not treason or felony, expressed in the warrant, or where the prisoner is in gaol on any process for debt, &c. amounting on the whole to the sum of 100*l.* a misdemeanor punishable by fine and imprisonment. *Id. ibid.*]

[To convey instruments proper to facilitate escapes in the former cases, transportation for 7 years. In the case of petty larceny, a misdemeanor. *Id.*]

[Assisting any prisoner to attempt to make his escape from the custody of any constable, &c. in order to carry him to gaol by virtue of warrant of commitment for treason or any felony (except petty larceny) expressed in such warrant; or assisting any felon to attempt to make his escape from any boat, &c. carrying felons for transportation, or from the contractor for the transportation of such felons; transportation for 7 years. *Id.*]

[And to rescue such offenders as mentioned in *§. 24 Geo. 3. c. 56.* from persons contracting, under that statute, for their transportation, or assisting them to make their escape, felony without benefit of clergy. *§. 4.*]

[To rescue any person out of prison, who shall be committed for, or found guilty of, murder, or any person convicted of murder, going to execution or during execution; without benefit of clergy.]

[And to rescue the dead body of such malefactor from such persons as shall have the custody of it by this act; transportation for 7 years; returning within the time death without benefit of clergy. 25 Geo. 3. c. 37.]

[And, by 9 Geo. 1. c. 22. commonly called the Black Act, *forcibly* to rescue any person lawfully in custody of any officer, for any of the offences mentioned in the act; or by promise, &c. procuring any of his majesty's subjects to join in such unlawful act; excluded clergy.]

As to escape, *vide Escape*, (A 1, 2.)

## (S) Felony by Statutes.

### (S) Durefs.

BY the *§. 14 Ed. 3. 10.* if a gaoler compels a prisoner by *durefs* to be an appellor, it is felony. *Vide Imprisonment* (I). [3 *Inst.* 91.]

### (S 2.) Rape.

Rape was felony at the common law, and afterwards altered to the loss of eyes and testicles. 2 *Inst.* 180.

By the *§. W. 1. 3 Ed. 1. 13.* the penalty was mitigated to fine and imprisonment.



But by the *ft. W. 2. 13 Ed. 1. 34.* it is provided, that if a man ravish a woman, &c. he shall have judgment of life and member.

And if she did not consent she shall have an appeal: but if she afterwards consent she loses the appeal, yet he shall be indicted at the king's suit. *2 Inst. 433.*

By the *ft. 6 R. 2. 6.* if the woman afterwards assent to the ravisher, both shall lose their inheritance, dower, or joint-estate after the death of the husband or ancestor, and the next in blood shall enter; and he or the husband shall have an appeal.

The indictment shall say *rapuit*, which no word supplies. *Co. L. 124. a.*

Rape is when a man by force has carnal knowledge of a woman against her will. *Co. L. 123. b.*

Tho' it be of a niece by the lord. *Co. L. 123. b. 2 Inst. 181.*

There must be carnal knowledge. (*Vide 1 H. P. C. 117. 3 Inst. 60.*)

*Penetratio* as well as *emissio*. *H. P. C. 117. 3 Inst. 60. [1 H. P. C. 628.]*

Tho' consent be forced, by the fear of death or duress, it is a rape. *3 Inst. 60.*

But if there be consent, it is no rape. *2 Inst. 433.*

If the woman prove *privement enseint* it is evidence of consent: [but not conclusive. *1 H. P. C. 631.*]

So, if she be an harlot; yet an harlot may be ravished.

Or, was his concubine before.

By the *ft. 18 El. 7.* carnal knowledge of an infant under ten years old is felony, tho' there be consent.

Whoever aids the rape is a ravisher. *H. P. C. 118. [H. P. C. 628. tho' it be the husband, and altho' she cannot have an appeal against her husband, he may be indicted at the king's suit. Id. 629. The wife a good witness against her husband.]*

[An infant under the age of 14 years is presumed to be unable to commit a rape, and therefore cannot be guilty of it. But he may be a principal in the second degree, as aiding and assisting. *1 H. P. C. 630.*]

*Vide post. (Y 12.)*

(S 3.) Forcible Marriage of a Woman contrary to *3 H. 7. 2.*

By the *ft. 3 H. 7. 2.* it is enacted, that persons who take a maid, widow, or wife, having substance in goods or lands, or being an heir apparent, against her will to marry or defile her, their abettors and receivers, knowing the same, are felons.

If she be married tho' not deflowered, it is within the statute. *R. 1 Vent. 244.*

Tho' she consent to the marriage, being under a force. *H. P. C. 119.*

All accessories, before or after, are principals. *H. P. C. 119. 3 Inst. 61.*

The woman is a good witness. *R. 1 Vent. 244.*

But forcible marriage of a niece or ward, is not within the statute. *H. P. C. 118. 3 Inst. 61.*

Nor, privies to the marriage, if not privy to the force. *H. P. C. 119.*

If

If the taking be in one county and the marriage in another, the county where they were married may inquire of the forcible taking. *H. P. C. 119.*

*Vide post. (Y 12.)*

(S 4.) Buggery.

By the *st. 25 H. 8. 6.* revived by the *st. 5 El. 17.* when any commit buggery with mankind, or beast, and is convicted by verdict, confession, or outlawry, he shall suffer as a felon, without benefit of clergy.

[Indictment *quod A. super B. virginem, insultum fecit, & eandem B. contra ordinem naturæ carnaliter cognovit, & rem veneream in ano ipsius B. habuit, eamque B. contra ordinem naturæ in dicto ano ipsius B. carnaliter cognovit*; the defendant was convicted of buggery at the assizes, but reprieved, to have the opinion of the judges, whether it was buggery within the statute. Most of the judges were of opinion it was, but two or three that it was not; and no unanimous opinion given. *Rex v. Wiseman, 4 Geo. Fort. 91.*

*Vide post. (Y 13.)*

(S 5.) Polygamy.

By the *st. 1 Jac. 11.* if any in *England* or *Wales* being married, marry again, the former husband or wife being living, it is felony, unless the husband or wife were absent beyond sea for seven years before, or in the realm without knowledge of his or her life, or the former marriage was within the age of consent, or annulled by sentence in the ecclesiastical court, or there was a divorce. Provided not to forfeit dower, or corrupt blood. [*Vide 1 H. P. C. 692.*]

A marriage after a divorce *a mensu & thoro*, is not felony within the statute. *H. P. C. 122. R. Mar. 101. (causa adulterii.) R. Kels, 27. 3 Inst. 89.*

Nor, a marriage of one beyond sea, and of another within the realm. *R. 1 Sid. 171.*

But a divorce for severity, is no excuse of felony. *R. Mar. 101. Dub. Cro. Car. 462. But said it was R. to be within the proviso. Kels, 27. 1 Hawk. 174.*

The first husband is no witness to prove his marriage. *R. Ray. 1.* [Where a woman marries a second husband, the first being alive and the second not privy; the second husband is entitled to the produce of the labour of the wife during cohabitation. By *Parker Ch. J. H. 4 Geo. Strutville's Case.*]

[A woman cannot maintain action against a man for this offence, if he has been convicted and burnt in the hand for it; for the action merges in the felony. *Barnes, 450.*]

(S 6.) Malicious Mayhem.

[Mayhem, at common law, is the violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself, or to annoy his adversary, and therefore to cut off his ear, or nose, or the like, not weakennig but only disfiguring him, was held not to be mayhem at common law. *1 Hawk. 175.*]

But

But by the *ft. 5 H. 4. 5.* if any cut out the tongues, or put out the eyes of any of the king's liege people, of malice prepenſe, it is felony.

By the *ft. 22 & 23 Car. 2. 1.* if any of malice, and by lying in wait, cut out or diſable the tongue, put out the eye, ſlit the noſe, cut off the noſe or lip, cut off or diſable any member of any ſubject, with intent to mayhem or diſfigure him, it is felony in him, his aiders, or abettors, without clergy.

[If a man attack another of malice in order to murder him, with a bill or ſuch an inſtrument as cannot but endanger the maiming of him, and happen not to kill, but only to maim, he may be indicted on this ſtatute with his abettors, &c. and it ſhall be left to the jury on the evidence, whether the deſign were not to murder by maiming, and conſequently a malicious intent to maim as well as murder. 6 *State Tr.* 212.]

By the *ft. 22 & 23 Car. 2. 7.* if any maliciously, in the night-time, kill or deſtroy any horſes, ſheep, or other cattle, it is felony. [*Vide 9 Geo. 1. c. 22. ft. 1. part 2.*]

(S 7.) Felonious Hunting, &c.

By the *ft. 37 Ed. 3. 19.* if any ſteal and carry away a hawk, not doing according to the ordinance, it is felony.

And by the *ft. 1 H. 7. 7.* the king's council or the juſtices of peace, on information of hunting by night, or with painted faces, may iſſue a warrant to arreſt the perſons, and if any arreſted conceal thoſe with him, or if any make *reſcous* or diſobeyance to the warrant, ſo that it cannot be executed, or if any be convicted of hunting in the night, or with vizors or painted faces, it is felony.

[Perſons convicted a ſecond time of hunting and taking away deer out of unincloſed foreſts or chafes to be transported, and returning within the term, felony without benefit of clergy. 10 *Geo. 2. c. 32. ft. 7.* made perpetual by 31 *Geo. 2. c. 42. ft. 6.*]

[The ſeveral facts in the black act, 9 *Geo. c. 22.* are ſeveral offences; and if any perſon armed appears in a high-road with his face blacked, or otherwiſe diſguiſed, he is guilty of felony without clergy. *Rex v. Baylis, T. 9 Geo. 2. B. R. H. 291. Vide 5 Geo. 1. c. 28. & 16 Geo. 3. c. 30.*]

(S 8.) Soldiers departing without Licence.

By the *ft. 18 H. 6. 19.* if any, being muſtered, and entred the king's ſoldier of record, and receiving the king's wages, departs from his captain, unleſs diſabled by ſickneſs to go, of which he ſhall give notice to his captain, and repay his money; or, being a ſoldier, man of arms, or archer, ſo muſtered of record, and paſſing the ſeas with his captain, returns without licence from his captain under his hand and ſeal for reaſonable cauſe, during his term, he is guilty of felony.

But this act is of little force; for the antient manner of retaining and covenant with ſoldiers is diſcontinued. *R. 6 Co. 27. 3 Inſt. 86.*

Yet, by the *ft. 5 El. 5.* it was extended to mariners and gunners.

By the *ft. 7 H. 7. 1.* if any ſoldier being no captain, retained with the king, being in wages and retained, or taking preſt to ſerve the king on the ſea, or upon land beyond ſea, ſhall depart out of the king's ſervice without licence of the captain, it is felony without clergy.

And



And by the *st.* 3 *H.* 8. 5. if any soldier, being no captain, retained with the king, who shall be in wages and retained, or take any preft to serve the king upon the sea, or on the land, or beyond sea, departs without licence of the lieutenant, it is felony without clergy (not being within the orders of holy church).

By the *st.* 2 & 3 *Ed.* 6. 2. if any having served the king, departs without licence, out of the king's service, or out of garrison, it is felony without clergy.

The statutes 7 *H.* 7. 1. and 3 *H.* 8. 5. are perpetual. *R.* 6 *Co.* 27. 3 *Inst.* 86.

And departure from a conductor is felony, for he is a petit captain. *R. Cro. Car.* 72.

[By 1 *G.* 3. c. 6. being the mutiny act, every officer and private man who shall mutiny or desert, or join, &c. or whoever being a soldier actually enlisted in any regiment, &c. shall list in any other regiment, &c. or shall be found sleeping on his post, or shall desert it, or hold illegal correspondence with the enemies of his majesty, or shall strike or disobey his superior officer; shall suffer death, or such punishment as a court martial shall inflict.]

And by 27 *G.* 2. c. 9. similar provisions are made for the same offences by officers or soldiers in the service of the *East India Company* during the period of their agreement.

[Officers in the *East India Company's* service cannot resign at all times, and under any circumstances; and while in their pay and service are subject to their military law. *Parker v. Ld. Clive*, *P.* 9 *G.* 3. 4 *B. M.* 2419. *Virtue v. Ld. Clive*, *M.* 10 *G.* 3. 4 *B. M.* 2472.]

(S 9.) Egyptians, Rogues, Wandering Soldiers, &c.

By the *st.* 1 & 2 *Ph.* & *M.* 4. persons calling themselves *Egyptians*, conveyed into the realm and remaining here a month, if above thirteen years old, are felons without clergy, unless in twenty days they betake themselves to an honest way of living.

And by the *st.* 5 *El.* 20. such as continue a month at one or several times in company of vagabonds, commonly called *Egyptians*, or by apparel, speech, or behaviour counterfeiting themselves such, if above fourteen, shall suffer as felons without clergy.

By the *st.* 39 *El.* 4. dangerous rogues, banished the realm by justices of peace and returning without a licence, be felons.

By the *st.* 39 *El.* 17. idle and wandering soldiers or mariners, who will not betake to any lawful course of life, or to the place of their birth or abode: and such who come from beyond sea, and have not a testimonial from a justice of peace, or counterfeit such testimonial, or have one known to be counterfeit, be felons without clergy.

By the *st.* 1 *Jac.* 7. a dangerous rogue in sessions shall be branded, and if he afterwards beg or wander, shall be adjudged a felon without clergy.

*Vide Justices of Peace*, (B 76.) and Statute 17 *Geo.* 2. c. 5.

(S 10.) Exportation of Sheep, &c.

By the *st.* 8 *El.* 3. such as, after conviction for the first offence, shall export sheep alive out of the realm, are guilty of felony; but not to corrupt blood, or lose dower.

By

By the *ſt.* 13 & 14 *Car.* 2. 18. if any export into *Scotland*, or other foreign parts, or pack or load, or cauſe to be packed or loaden, of intent to be exported, any ſheep of the breed of *England* or *Wales*, or the dominions thereof, or any wool, woolfells, mortlings, ſhortlings, yarn made of wool, woolflocks, fullers' earth or fulling clay, it is felony.

But by the *ſt.* 7 & 8 *W.* 3. 28. this act is repealed, as to making the exportation of wool felony.

(S 11.) Refuſing Abjuration, &c.

By the *ſt.* 35 *El.* 1. if any above ſixteen, who ſhall for a month without cauſe reſuſe to hear divine ſervice, go about to perſuade any of the realm to impugn the queen's authority in caſes eccleſiaſtical, or to that end perſuade to forbear coming to church according to law, or to be preſent at a place of religious aſſembly contrary to law; or ſhall of himſelf or by incitement of others be preſent at ſuch aſſembly, and being convicted of ſuch offence, and for not conforming three months after conviction, being required by the juſtices, in quarter ſeſſions, &c. to abjure the realm, ſhall reſuſe to abjure, or after abjuration ſhall reſuſe to depart at the time limited, or ſhall return, &c. he ſhall be a felon without benefit of clergy. Provided not to corrupt blood, or loſe dower.

By the *ſt.* 3 *Jac.* 4. if any paſs out of the realm to ſerve, or do voluntarily ſerve any foreign prince, without having taken the oath of allegiance: or, (being a gentleman, or of higher degree, or a captain, lieutenant, or conductor of ſoldiers,) without giving a bond of 20 *l.* penalty conditioned not to be reconciled to the ſee of *Rome*, or to enter into any plot againſt the king or realm, but to diſcloſe all ſuch, he ſhall be a felon.

By the *ſt.* 35 *El.* 2. a Popiſh recusant above ſixteen and convicted for not coming to church, (not being a *feme-covert*, nor having twenty marks *per annum* in lands, tenements, or annuities, nor to the value of 40 *l.* in goods,) if he repair not to his dwelling- or place of birth in forty days after conviction, (unleſs ſtayed by imprisonment, order of the queen or ſix privy council, or ſickneſs,) and then certify his name to the miniſter or conſtable, or after depart above five miles from home, ſhall abjure; and if he reſuſe to abjure, or after to depart the realm, or return, he ſhall be adjudged a felon, without benefit of clergy.

*Vide Sacraments.*

(S 12.) Embezzlement of Stores.

By the *ſt.* 31 *El.* 4. if any, having charge, &c. of purpoſe to hinder her majeſty's ſervice, wittingly embezzle, purloin, or convey away any armour, ordnance, munition, ſhot, powder, or victuals for ſoldiers, &c. or other habiliments of war, at one or ſeveral times to the value of 20 *s.* he ſhall ſuffer as a felon; provided he be proſecuted within a year; not to corrupt blood, or loſe dower.

And by the *ſt.* 22 *Car.* 2. 5. clergy is taken away.

[By *ſt.* 1 *G.* 1. *ſt.* 2. *c.* 25. when the goods embezzled are under the value of 20 *s.* the offender ſhall be fined, not exceeding double  
the

the value of the goods; the fine levied by distress, and for want of distress offender imprisoned three months.]

(S 13.) Witchcraft.

By the *st.* 1 *Jac.* 12. if any practise invocation, or conjuration of any evil spirit; or shall consult, covenant with, &c. any evil spirit; or take up any dead body, skin, bone, &c. to be used in any manner of witchcraft, sorcery, charm, or incantment; or shall use any witchcraft, incantment, charm, or sorcery, whereby any person shall be killed, wasted, or lamed in his body or any part of it, their abettors, aiders, &c. Or, if any, after conviction for the first offence, shall take upon him by witchcraft, incantment, charm, or sorcery, to tell where treasure may be found in the earth; or lost goods may be found; or to the intent to provoke to unlawful love; or whereby cattle or goods shall be destroyed or impaired; or to hurt any person in his body, tho' the same be not effected, he shall suffer as a felon without clergy. Provided not to corrupt blood, or lose dower. [This statute is repealed by the *st.* 9 *G.* 2. *c.* 5. *Vide infra.*] *Vide Justices of Peace*, (B 13.)

At common law, witchcraft was punished as heresy, by the writ *de heretico comburendo*. *H. P. C.* 6. 3 *Inst.* 44.

But now there is no remedy but by the *st.* 1 *Jac.* 12. *H. P. C.* 6. 3 *Inst.* 45.

By this statute, it is felony to consult, covenant with, entertain, employ, feed, or reward an evil spirit; tho' no act be thereupon done. *H. P. C.* 6. 3 *Inst.* 45.

So, to take up a dead body, &c. to use in witchcraft; tho' not used. *H. P. C.* 6. 3 *Inst.* 45.

So, to take upon them to tell where treasure or goods shall be found, how love shall be provoked; tho' they cannot do it. *H. P. C.* 7. 3 *Inst.* 46.

But to use sorcery, &c. whereby any one may be killed, or destroyed, or goods or cattle destroyed, is no felony, unless the mischief be done. *H. P. C.* 7. 3 *Inst.* 45, 46.

In all cases, where a second offence is felony, there must be an actual conviction and judgment for the first offence. *H. P. C.* 8. 3 *Inst.* 46.

And the second offence must be committed after judgment for the first. *H. P. C.* 8. 3 *Inst.* 46.

[By the *st.* 9 *G.* 2. 5. the *st.* 1 *Jac.* 12. is repealed, (except so much as repeals the *st.* 5 *El.* 16.) and no prosecution shall be carried on for witchcraft, &c. And if any person pretend to exercise any witchcraft, sorcery, &c. or undertake to tell fortunes, or pretend to discover where goods, supposed to be stolen or lost, may be found, he shall be imprisoned for a year, and once in every quarter of it be set on the pillory, and (if the court think fit) be bound for his good behaviour.]

(S 14.) Felonies by other Statutes. Assault.

[By 6 *G.* 1. *c.* 23. *f.* 11. to assault any person or persons in the streets or highways, with intent to tear their cloaths, shall be felony, and the offender may be transported for seven years.]

By 7 *Geo.* 2. *c.* 25. *f.* 1. to assault with offensive weapons and intent to rob, felony and transportation for seven years. [By



[By 12 G. 1. c. 34. f. 6. to assault or abuse any master woolcomber, or master weaver, or any other concerned in the woollen manufactures, whereby they shall receive any bodily hurt for not complying with any illegal bye-laws, &c. or to write, &c. or send, &c. any letter, &c. threatening any harm to such master or other person, or to threaten to burn, &c. any of their houses or out-houses, or to cut or destroy any of their trees, or to maim or kill any of their cattle, for not complying with any demands, &c. is felony liable to transportation for seven years.]

[(S 15.) *Bankrupt*.—By 5 G. 2. c. 30. bankrupt not surrendering within forty-two days notice in the *Gazette* unless the time be enlarged by the Lord Chancellor, and conforming to the statutes; or embezzling goods, &c. to the value of 20*l.* shall be guilty of felony, without benefit of clergy.]

[(S 16.) *Bastard*.—By 21 J. 1. c. 27. and 16 Car. 1. c. 4. the mother of a bastard child, endeavouring so to conceal the death of it, as that it may not come to light, whether it were born alive or not, shall suffer death as in case of murder, unless she can prove, &c. that the child was born dead.]

(S 17.) Letters.

[By 9 Geo. 1. c. 22. f. 1. knowingly to send any letter without a name, or signed with a fictitious name, demanding money, venison, or other valuable thing; or, to rescue any person in custody for such offence, is felony without clergy.]

By 27 Geo. 2. c. 16. to send any letter without a name, or with a fictitious name, threatening to kill or murder any of his majesty's subjects, or to burn their houses, &c. tho' no money or venison or valuable thing be demanded in such letter, or to rescue any such offender, is felony without clergy.

[By 30 G. 2. c. 24. to obtain money or goods under false pretences, with intent to cheat or defraud; or to send or deliver any letter *with* or *without* a name, or signed with a fictitious name, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or other infamous punishment, with a view to obtain money, &c. from the person so threatened to be accused, shall be deemed offences against law and the public peace; and the offender shall be fined and imprisoned, or put in the pillory, or whipped, or transported at the discretion of the court.]

(S 18.) Malicious Mischief.

[*Banks*.—By 6 G. 2. c. 37. f. 5. made perpetual by 31 G. 2. c. 42. f. 3. unlawfully and maliciously breaking down or cutting down the bank or banks of any river, or any sea bank, whereby any lands shall be overflowed or damaged, is made felony without benefit of clergy.]

[*Destroying Bridges*.—For *Fulham* bridge, see 12 G. 1. c. 36. f. 3. *Westminster* bridge, 9 G. 2. c. 29. f. 5. *Walton* bridge, 20 G. 2. c. 22. *Hampton Court*, 23 G. 2. c. 37. f. 12. *Ribble*, 24 G. 2. c. 36. f. 34. *Sandwich*,

*Sandwich*, 28 G. 2. c. 55. *London bridge*, 29 G. 2. c. 40. f. 6. and 31 G. 2. c. 73. *Black Friars*, 29 G. 2. c. 86. *Jeremy's ferry*, 30 G. 2. c. 59. *Old Brentford*, 30 G. 2. c. 63. f. 19. 31 G. 2. c. 46. *Trent*, 31 G. 2. c. 59.]

For *Cattle*, see *Mayhem*.

[*Cloaths*.—By 6 G. 1. c. 24. f. 41. any person who shall assault another in the public streets or highways with intent to tear, spoil, cut, burn or deface, and shall tear, &c. the garments or cloaths of the person so assaulted, shall be guilty of felony, and transportable for seven years.]

[*Coal*, &c.—By 12 G. 2. c. 32. f. 6. made perpetual by 31 G. 2. c. 42. f. 5, 6. maliciously setting on fire, or causing to be set on fire, any mine, pit, or delph of coal or cannel coal, is felony without benefit of clergy.]

[*Corn*.—By 11 Geo. 2. c. 32. f. 1. maliciously to beat, &c. any person with intent to deter, &c. him from buying corn or grain in any market, &c. or to stop or seize on any waggon, &c. loaded with wheat, &c. in or on the highways, &c. or maliciously to break, cut or destroy the same, or the harness of the horses; or unlawfully to take, drive away, &c. the horses, or to beat or wound the driver; or by cutting the sacks, to scatter such wheat, &c. for the first offence, imprisonment not exceeding three months and public whipping: and by f. 2. the second offence, felony and transportation for seven years.]

[And by f. 2. maliciously to pull down, &c. any storehouse or granary, where corn shall be kept for exportation, or unlawfully to enter any such storehouse, &c. and take and carry away any corn, &c. therefrom, or to throw abroad or spoil the same: or unlawfully to enter on board any ship, &c. and wilfully take and carry any meal, &c. therein, intended for exportation; is felony and transportation for seven years.]

For *Customs*, see *Smuggling*, *post*. (S 22.)

[*Hops*.—By 6 G. 2. c. 37. f. 6. made perpetual by 35 G. 2. c. 42. f. 2. 4. maliciously to cut hop-binds growing on poles in any plantation of hops, is felony without benefit of clergy.]

[*Linen*.—By 4 G. 3. c. 37. f. 16. to break by day or night into any house, shop, &c. or by force to enter any house, &c. with intent to steal, cut or destroy any linen yarn or linen cloth, or any manufacture of linen yarn belonging to any manufactory, or the looms, tools, or implements used therein; or maliciously to cut in pieces or destroy such goods, when exposed to bleach or dry; is felony without benefit of clergy.]

[By *stat*. 6 G. 3. c. 28. maliciously destroying silk in the loom, or entering house to destroy, is felony without clergy.]

[*Mills*, *mines*, &c.—By 9 G. 3. c. 29. riotously destroying mills, maliciously

maliciously setting fire to mills, is felony without clergy; maliciously destroying engines for draining mines, or drawing out coals or ore, or way for conveying the same, or any fence for inclosing or dividing lands in pursuance of act of parliament, is felony and transportation for seven years.]

[*Naval stores, &c.*—By *stat. 12 G. 3. c. 24.* destroying men of war, or naval stores in a dock-yard, is felony without clergy; and persons offending out of the realm may be tried, in any county.]

*Process.*—[By *stat. 9 G. 1. c. 28. s. 1, 2.* wilfully to obstruct any person serving or endeavouring to serve or execute any writ or rule or order of court of law or equity, or any legal process whatever, or any escape warrant, or other warrant of any justice of peace, or to abuse or assault any such person so serving, or to make rescue of any prisoner taken on any such writ, &c. within the limits of a certain pretended privileged place, called *Suffolk Place*, or the *Mint*, in the parish of *St. George*, in the county of *Surrey*; or to harbour any prisoner so taken, or any person rescuing such prisoner, or to aid and abet in resisting, &c. or in rescuing, &c. or to presume to exercise any unlawful jurisdiction, &c. within the said limits; is felony and transportation, as in other cases.]

And by *s. 3.* to join in, or aid and abet any riot or tumult within the said limits in any vizard, mask, or disguised habit, or with a face disguised, &c. or in such disguise to oppose the execution of any legal process, &c. is felony without benefit of clergy; and for aiders and abettors, transportation.

[By *st. 11 Geo. 1. c. 22.* similar provisions are made against similar offences in the hamlet of *Wapping-Stepney*.]

[*Pulling down chapels, &c.*—By *st. 1 G. 1. c. 5. s. 4.* persons riotously assembled, with force demolishing or pulling down, or beginning, &c. any church or chapel, or any building for religious worship, certified and registred according to *1 W. & M. st. 1. c. 18.*, or any dwelling house, barn, stable, or other out-house, shall be adjudged guilty of felony without clergy.]

*Ships.*—[By *st. 23 Car. 2. c. 11. s. 12.* any officer, &c. wilfully destroying any ship, is declared guilty of felony. And by *st. 1 Ann. st. 2. c. 9. s. 4. & 5.* captain, master, &c. wilfully casting away, burning, &c. any ship to the prejudice of the owners, is declared guilty of felony without benefit of clergy; and such offences committed on the high seas may be tried in any county.]

Similar provisions made by *st. 4 G. 1. c. 12. s. 3.* and *st. 11 G. 1. c. 29. s. 6.* against owners, masters, &c. destroying, &c. any ship to the prejudice of the insurers.

[By *12 Ann. st. 2. c. 18. s. 5.* to make or assist in making any hole in any vessel in distress; or to steal the pump, or wilfully do any thing tending to the immediate loss of such vessel, is felony without benefit of clergy. *Vide 26 G. 2. c. 19. s. 1.*]

[*Trees, &c.*—By *6 G. 3. c. 36.* lopping, topping, cutting down, breaking, burning, or spoiling, or carrying away, in the night any  
oak



oak, beech, throwing down, barking, ash, elm, fir, chefnut or asp, or other timber tree, or digging up, &c. any roots, shrubs, or plants of 5s. value in enclosed ground, transportation for seven years; and aiders and receivers liable to the same penalty.]

[*Turnpikes, &c.*—By 8 *Geo. 2. c. 20.* by day or night maliciously to pull down, pluck up, throw down, level, or otherwise destroy any turnpike-gate, or any post, rail, wall, chain, bar, or fence belonging to such turnpike-gate, or any other chain, &c. erected to prevent passengers from passing without paying any toll imposed by act of parliament; or any house erected for the use of such turnpike-gate, or any other fence, or any lock, sluice, flood-gate, or other work on any navigable river erected by authority of parliament; or forcibly to rescue any person in custody for any of the said offences; felony without clergy.]

[And such offences may be tried in any adjacent county, but no corruption of blood, &c.]

[*Woollen.*—By 12 *Geo. 1. c. 34. f. 7.* to break into any shop to cut any serge or other woollen goods in the loom, &c. is felony without clergy.]

#### (S 19.) Mutiny.

[By 22 & 23 *Car. 2. c. 11. f. 9.* every mariner who shall lay violent hands on his commander, to hinder him from fighting in defence of his ship and goods committed to his trust, shall suffer death as a felon.]

[By 2 & 3 *Ann. c. 20. f. 35.* any officer or soldier either on land, out of *England*, or upon the sea, who shall raise or cause to be raised any mutiny or sedition in the army, or shall refuse to obey his superior officer, &c. shall suffer death as in case of felony.]

#### (S 20.) Perjury.

[By 2 *Geo. 2. c. 25.* any person convicted of perjury or subornation of perjury, may, beside the punishment then inflicted by the law, be committed to the house of correction for any time not exceeding seven years, or may be transported for seven years; and to escape, or break prison, or to return from transportation within the time, is felony without benefit of clergy; and such felony may be tried in the county where he so escaped, or where he was apprehended.]

#### (S 21.) Quarantine.

[If the plague shall appear on board any ship to the Northward of *Cape-Finisterre*, the commander shall immediately proceed to the harbour of *St. Helen's Pool*, or to such other place as the privy council shall appoint, and from thence cause intelligence of the condition of his ship to be conveyed to the Secretary of State. But if he shall not be able to make *Scilly*, or is forced to go up either of the channels, he shall not enter with such ship any port, but shall remain in some open road, avoiding all intercourse with other ships till the king's pleasure be known, on pain of being adjudged guilty of felony without benefit of clergy. 26 *Geo. 2. c. 6.* 29 *Geo. 2. c. 8.*]

By *f. 2. of 29 Geo. 2. c. 6.* the master or commander of a vessel coming from an infected place, or having any person on board infected, and concealing the same, is declared guilty of felony without benefit of clergy.

And by *f. 8.* any person obliged to perform quarantine, who shall refuse or neglect to repair to the place appointed in the manner which the act directs, or being there, shall afterwards escape before quarantine be fully performed, shall suffer death without clergy.

By *f. 10.* found persons entering a lazaret, &c. obliged to perform quarantine and afterwards escaping before the time; and

By *f. 17.* the superintendant of quarantine, &c. acting contrary to his duty, or an officer giving a false certificate; and

[By *f. 18.* persons concealing or clandestinely conveying letters, goods, &c. from any ship under quarantine, &c. shall all be liable to the same penalty.]

(S 22.) Smugglers.

[By *6 Geo. 1. c. 21.* eight persons or more hindering, obstructing, &c. officers of the customs in the execution of their office, shall be transported, and returning before the term, death without clergy.]

By *8 Geo. 1. c. 18.* persons passing with foreign goods landed without entry, &c. and being more than five, &c. and resisting, &c. officers of the customs to be transported, and returning, &c. death without clergy.

Persons liable to be transported for offences against the customs, committing the like after claiming the benefit of the act of *9 Geo. 2. c. 35.* for indemnifying persons who have been guilty, &c. shall be guilty of felony without benefit of clergy. *18 Geo. 2. c. 28.*

By *9 Geo. 2. c. 35. f. 10.* three or more persons assembling armed, &c. to assist in running goods, shall be transported, and returning, &c. without clergy.

By *f. 13.* two or more persons found passing together, within five miles of a navigable river or the sea coasts with horse, carriage, &c. laden with more than six pounds of tea, or five gallons of brandy, &c. the duties being unpaid, &c. and bearing offensive arms, &c. to be deemed runners of foreign goods, and subject to the same punishment.

By *f. 28.* any person or persons forcibly obstructing, &c. any officer of the customs on board any ship or vessel in the execution of his office, liable to the same penalty.

By *19 Geo. 2. c. 34.* armed persons to the number of three assembled to assist in the illegal exporting or running of goods, &c. or appearing in disguise with such goods, or resisting officers in the execution of their duty, is felony without benefit of clergy.

By the same statute, if any one shall be charged on oath with being guilty of any of the offences mentioned in the former part of the statute, before any of the magistrates described, such magistrate shall certify such information under his hand and seal to one of the principal Secretaries of State, who is to lay it before his majesty in privy council; whereupon his majesty is to make an order requiring the offender to surrender within the space of 40 days after the first publication thereof in the *London Gazette*, to some one of the magistrates before mentioned; which order the clerks of the privy council shall

cause

cause to be printed forthwith in the two successive *London Gazettes*, and to be immediately transmitted to the sheriff of the county where the offence was committed, who shall within 14 days after the receipt thereof, cause it to be proclaimed between the hours of ten in the morning and two in the afternoon in the market places, on the respective market days, of two market towns in the same county, near to the place where such offence shall have been committed, and a true copy of such order shall be affixed on some public place in such market towns. And if the offender do not surrender pursuant to such order, or having surrendered shall afterwards escape, he shall suffer death without clergy.

And if any person after the time for surrender expired, shall harbour, &c. such person so charged, &c. knowing him to be so charged and required to surrender and not to have surrendered, being convicted within one year after the offence committed, he shall be guilty of felony and transported for seven years; returning, &c. without clergy.

For points resolved on this surrender clause, see *Foster*, 51, 56, 57.

[By 24 Geo. 3. *ft.* 2. *c.* 47. *f.* 11. if any person on the shore or on board any ship, &c. shall maliciously shoot at or upon any ship, &c. belonging to his majesty's navy, or in the service of the customs or excise within the limits of any port, &c. of Great Britain, or within four leagues of any part of the coast; or, if any person being on shore, &c. shall maliciously shoot at, or maim, or dangerously wound any officer of his majesty's navy, or of the customs or excise, whether attempting to go on board, or being on board, or returning from on board any ship, &c. or otherwise acting in the due execution of his duty on shore, or within the limits of any port, &c. or shall maliciously shoot at, &c. any person assisting such officer, &c. then every person so offending, his aiders and abettors, shall be guilty of felony without clergy.]

[*Vide Leach's Edition of Hawk. vol. 1. 227.*]

#### (S 23.) Stolen Goods.

[By *ft.* 4 Geo. 1. *c.* 11. persons convicted of buying or receiving stolen goods, knowing them to be stolen, shall be transported for the term of fourteen years. Money does not come under the description of goods under this statute: but by 2 Geo. 2. *c.* 25. to steal bank notes is made felony and liable to such punishment as the stealing of other goods, and therefore the knowing and felonious receivers of this species of property are liable to punishment like other offenders. 1 *Hawk.* 232. *Leach's Notes.*]

By 18 Geo. 2. *c.* 27. buyers and receivers of linen, cotton, &c. stolen from the bleaching croft are ousted of clergy; but by the next clause the court may, instead of death, order them to be transported for fourteen years.

By 25 Geo. 2. *c.* 10. the buyers and receivers of any wad or black cawke, commonly called black lead, knowing the same to be stolen from the mine, shall be construed to be guilty of felony; and being convicted shall be subject to all the pains and penalties to which any person can be subject, for buying or receiving any goods or chattels



that have been feloniously taken or stolen, knowing the same to have been stolen.

By 29 *Geo. 2. c. 30.* every person who shall buy or receive any *lead, iron, copper, brass, bell-metal, or solder*, knowing them to be stolen, altho' the principal felon shall not have been convicted of stealing the same, shall on conviction by due course of law be transported for fourteen years.

By 2 *Geo. 3. c. 28.* whoever shall buy, or receive any part of the cargo or loading of, or any goods, stores, or things of or belonging to any ship or vessel in the river *Thames*, knowing them to be stolen, altho' the principal offender has not been convicted of stealing, or unlawfully procuring the same, shall be transported for fourteen years.

By 10 *Geo. 3. c. 48.* every person who shall buy or receive any stolen jewel or jewels, or stolen gold or silver plate, watch or watches, knowing the same to have been stolen, shall, in all cases where the stealing shall have been accompanied with a burglary actually committed, or shall have been feloniously taken by a robbery committed on the highway, be triable, as well before conviction of the principal felon, whether he shall be in or out of custody, as after his conviction, and being convicted, he shall be transported for the space of fourteen years.

By 21 *Geo. 3. c. 69.* whoever shall buy or receive stolen pewter, knowing it to be stolen, tho' the principal felon be not convicted, shall be transported for any time not exceeding seven years, or kept in prison, to hard labour for any time not exceeding three years, nor less than one year, and within that time (if the court shall think fit,) shall be once or oftner, but not more than three times, publicly whipped.

[By 4 *Geo. 1. c. 11. s. 4.* whoever shall take money or reward, directly or indirectly, under pretence of helping any person to any stolen goods or chattels, shall (unless such person apprehend or cause to be apprehended the felon who stole the same, and cause him to be brought to his trial for the same) be guilty of felony, and suffer the punishment of felony according to the nature of the felony committed in stealing such goods, in the same manner as if such offender had himself stolen such goods and chattels, in the manner and with such circumstances as the same were stolen.]

#### (S 24.) Riots.

[By 1 *Geo. 1. s. 2. c. 5.* twelve persons or more riotously and unlawfully assembled to the disturbance of the public peace, and not dispersing within one hour after proclamation made by one justice or other person authorised by the act, shall be adjudged felons without benefit of clergy.]

[And by *s. 5.* if any person shall with force and arms, wilfully and knowingly oppose, &c. any person beginning to make proclamation or going to proclaim, whereby such proclamation shall not be made, such person so opposing, &c. shall be adjudged guilty of felony without benefit of clergy. And notwithstanding such proclamation shall not be made by reason of such obstruction, yet such persons as shall still continue riotously assembled together to the number of twelve, and

and shall not disperse within the space of one hour after such hindrance made, having knowledge of such hindrance made, shall suffer death without benefit of clergy.]

(S 25.) Solemnizing Marriage without Licence, &c.

[By *ft. 26 Geo. 2. c. 33. s. 8.* whoever shall solemnize matrimony in any other place than a church or public chapel where banns have been usually published, unless by special licence from the archbishop of Canterbury; or shall solemnize matrimony without publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same, shall be adjudged guilty of felony, and shall be transported for fourteen years.]

(T) Accessory.

(T 1.) Before the Fact, who shall be.

**A**ccessories to a felony are before, or after the felony committed. *2 Inst. 182. 3 Inst. 138.*

A man, who by his command, counsel, contrivance, consent, or encouragement, incites or moves another to commit a felony, tho' he be not present when it is done, will be an accessory before. *2 Inst. 182. H. P. C. 217.*

As, if he urge, persuade, or procure him to do it. *2 Inst. 182.*

If he furnish him with a weapon, &c. for such intent. *2 Inst. 182.*

[Whoever procures a felony to be committed, tho' by the intervention of a third person. *McDaniel's Case, December 1755. Foster, 121.*]

[Or, if he *consents* before-hand. *Ibid.*]

Tho' the fact vary in the circumstance of the command, &c. as, if *A.* command, &c. *B.* to poison *D.* and he shoots him, &c. *H. P. C. 217.*

So, tho' the execution of the fact exceeds the command: as, if the command be to commit a robbery, and he in the robbery kills. *H. P. C. 217.*

So, if the command be only for a tortious act not felony, and he in the execution commits felony: as, where the command was to beat another, and by the battery he killed him. *H. P. C. 217.*

If a statute makes a new felony, he shall be accessory who would be so before. *Sal. 543. H. P. C. 215.*

But where the fact varies in the substance and nature of the crime from the command, &c. he who commanded will not be accessory: as, if the command be to kill *A.* and he kills another person. *H. P. C. 217.*

[Although if *A.* commands *B.* to kill *C.* (whom he *B.* well knoweth) and he kills *D.* *A.* is not accessory; yet, if *A.* commands *B.* to kill *C.* (whom he *B.* knoweth not) describing him, and *B.* kills *D.* by mistake, *A.* is accessory. *Foster, 370.*]

[Or, if *A.* commands *B.* to burn the house of *C.* and he does it, and the flames take hold of the house of *D.* *A.* is accessory to the burning of *D.*'s house. *Ibid.*]

If the command be to commit a robbery, and he commits a burglary. *H. P. C. 217.*

So, if a statute makes a particular fact, which was an offence by the common law, more penal; the accessory shall not be subject to the penalty, unless he was present. *Per Holt; but the other justices sembl. contra. Sal. 452, 3.*

[Although in the language of the law there are no accessories in high treason; yet, those persons whose guilt is of a derivative nature, so connected with and arising out of that of another that it cannot exist without it, should be considered, during the intermediate steps towards conviction, as in the nature of accessories, or a kind of accessories: they should not be arraigned till the principal offender is convicted; if he is acquitted, they should be discharged. *Foster, 341—346.*]

[Thus the act of parliament for reversing Mrs. *Lisle's* attainder, calls her prosecution irregular and undue; because *Hicks*, whom she concealed, was not at the time of her trial attainted or convicted of high treason. *Foster, 346.*]

[This rule holds in every thing but compassing the death, &c. for every such treason is a complete overt act, tho' the fact is never effected or attempted. *Ibid.*]

[In felony, a principal may be in the first or second degree; he in the first is he who commits the fact; in the second, he who is present, aiding and abetting at the commission. *Foster, 347. 349.*]

[But an actual presence is not necessary; a constructive presence is sufficient. *Foster, 350.*]

[A person present, aiding and abetting rioters, is a principal in the second degree under 1 *Geo. 1. st. 2. c. 5. Rex v. Royce, P. 7 Geo. 3. 4 B. M. 2073.*]

[*Encouraging and abetting* are words sufficient in a special verdict, tho' *aiding* is omitted. *Ibid.*]

[Principals in the second degree were in old times deemed only accessories, and therefore this alteration was introduced about *Edward the Third's* time, that aiders and abettors present might be brought to their trials while the fact was recent, tho' the perpetrators were not then amenable. *Foster, 348. 359.*]

[He who is not present at the perpetration, can be no more than an accessory before the fact, except in special cases. *Foster, 349.*]

[If *A.* with intention to destroy *B.* lays poison properly disguised in his way. *B.* takes it and dies; *A.* tho' absent when the poison taken, is a principal. *Ibid.*]

[If *C.* instigates *A.* so to do, *C.* if absent is only an accessory. *Ibid.*]

[If *A.* and *C.* both mingle the poison, and lay it, both are principals. *Ibid.*]

[If *A.* prepares poison, and delivers it to *D.* to be administered to *B.* as a medicine, and *D.* in *A.'s* absence does it, *not knowing it to be poison*, *A.* is principal. *Ibid.*]

[If *D.* knew it to be poison, he is principal, and *A.* if absent accessory. *Ibid.*]

[If *A.* incites a madman, or infant not of years of discretion, to commit felony in his absence, *A.* is principal; if a child of sufficient discretion, only an accessory. *Ibid.*]

[If *A.* is present at a murder, but takes no part, nor yet endeavours to prevent, nor to apprehend, nor to levy hue and cry; he is neither principal nor accessory, tho' highly criminal. *Foster, 350.*]



[If it is in a case of assassination, &c. it may be evidence of his concurrence. *Ibid.*]

[If *A.* advises *B.* to poison his wife, she gives it to their child *C.* who eats it, *B.* standing by; *A.* is not accessory. *Foster*, 371. For that was not the crime he advised.]

[The general rule is this, if the principal committed the felony under the influence of the advice of *A.* or if the event was in the ordinary course of things a probable consequence of that felony, *A.* is accessory; but if the principal, following the suggestions of his own heart, wilfully and knowingly commits a felony of another kind, or upon another subject, *A.* is not accessory. *Foster*, 372.]

(T 2.) After the Fact, who shall be.

Accessory after will be, when a man receives and aids a felon, knowing that he is a felon, after an offence committed. 2 *Inff.* 183. *H. P. C.* 218.

Tho' it be his brother, or wife. *H. P. C.* 219.

As, if he conceal him in his house. (*Vide Dalt.* 530, 531. c. 161. f. 7.)

Or, supply him with money, horse, or other provision for his journey. *H. P. C.* 218.

[By *stat. 6 Geo. c. 23.* to assist felons convict to make their escape from the persons to whom they are delivered to be transported, is felony without clergy.]

[But then it must be laid that the defendant had notice of the other felony or conviction. *Rex v. Burrige, M.* 1735, 3 *P. W.* 439.]

[One becomes accessory to a felony after the fact, by assisting a felon convict, in custody under sentence of transportation, to escape out of prison, provided it be such assistance as amounts to receiving, harbouring, or comforting such felon. *Ibid.*]

[Before the *stat. 4 Geo. c. 11.* if an offender after clergy allowed had escaped before burnt in the hand, where actual burning should take place, whoever unlawfully comforted him became accessory after the fact; for by 18 *Eliz. c. 7.* both were necessary to the discharge from the felony, and to constitute the state pardon. *Ibid.*]

[Yet, if he is not burnt by reason of the doubt or delay of the court, it shall not turn to the prisoner's prejudice, but he may plead conviction (as of man-slaughter) to an appeal. *Ibid.*]

[Indictment for being accessory after the fact, in receiving a felon, it must be charged that the defendant knew that he was convicted; and this is not aided by the finding of the verdict, especially if it be a finding not of notice, but evidence of notice. *Ibid.*]

So, by the *stat. 3 & 4 W. & M. 9.* and 5 *Ann.* 31. a buyer or receiver of stolen goods knowing them to be stolen. *Vide stat.* 2 *G.* 3. c. 28.

[Persons receiving any goods, &c. belonging to a vessel in the *Thames*, knowing the same to be stolen, may be prosecuted for a felony under this statute. *Rex v. Wyer, M.* 28 *Geo.* 3. 2 *T. R.* 77.]

So, receiving an accessory to a felony, makes him accessory. *H. P. C.* 219.

But by common law, a receipt of goods stolen did not make him accessory, unless he received the felon. *H. P. C.* 218.

[A receiver of stolen goods may be indicted for a felony, or for a misdemeanor. *Rex v. Pollard*, *M.* 11 *Geo.* 2. *Ld. Raym.* 1370.]

[A receiver of stolen goods cannot be prosecuted for a misdemeanor, if the principal is in custody; the determination in 1 *Ld. Raym.* 1370. *supra*, being because the court would not on motion arrest judgment on an exception never taken before, and which would overturn every judgment on the statute. *Foster*, 373.]

Nor, receipt of a felon when the felony is not completed; as, after the wound, and before the death. *H. P. C.* 219.

Or, when a felony was only intended. *H. P. C.* 219.

So, relief of a felon in prison; or bound in surety for his appearance, does not make a man accessory. *H. P. C.* 218.

So, a man will not be accessory, who does not apprehend a felon. *H. P. C.* 216. 219.

Or, does not prevent the felony. *H. P. C.* 216.

Or, suffers the felon's escape, when he pursues him, or he comes to his house. *Mo.* 8. *H. P. C.* 220.

Or, writes in his favour. *H. P. C.* 219. 3 *Inst.* 139.

Or, instructs him to read, or advises to prevent the appearance of a witness against him. *H. P. C.* 219. 3 *Inst.* 139.

Or, agrees for money, that he will not give evidence against him. *Dub. Mo.* 8.

So, if a wife receive her husband, she shall not be accessory. *H. P. C.* 219.

So, he that would be accessory to felony by the common law, will be so if a statute makes a new felony. *H. P. C.* 215.

But in high treason there is no accessory; for procurers, abettors, &c. are all principals. 2 *Inst.* 183. *H. P. C.* 215. 12 *Co.* 81.

Nor, in petit larceny. *R. Cro. El.* 750. 12 *Co.* 81. 2 *Inst.* 183.

So, in every felony, all present and aiding are principals, tho' only one does the act. *H. P. C.* 215.

Tho' they do nothing, if they come with intent to assist. *H. P. C.* 216.

Or, if they do not come with a bad intent, but being present furnish a sword, &c. *H. P. C.* 216.

So, if they come with intent to aid, tho' not within view. *H. P. C.* 216.

So, all present and consenting to a poison prepared, tho' absent when taken. *H. P. C.* 216. 2 *Inst.* 183.

So, if they leave poison for another. *H. P. C.* 216.

So, by the *stat.* 3 *H.* 7. 2. all persons taking a woman (having lands or goods) against her will, and procuring and abetting the same, and receiving her knowingly, are to be judged principal felons.

So, in manslaughter, there can be no accessory before. *Mo.* 461. *H. P. C.* 217.

Nor, in forgery, which is felony for the second offence. *R. Mo.* 666.

So, there cannot be an accessory, where there is no principal.

So, if the principal be convicted for murder, the accessory cannot be for petit treason, *H. P. C.* 215. 3 *Inst.* 139.

(T 3.) How arraigned, and tried.

If the principal be acquitted, or die before attainder, the accessory shall not be arraigned. *H. P. C.* 221. 2 *Inst.* 184. So

So, if the principal be convicted only *se defendendo*. *H. P. C.* 221.  
Or, of manslaughter, if he be charged as accessory before. *H. P. C.* 221.

So, if the principal be pardoned before attainder. *H. P. C.* 221.  
*2 Inst.* 183. *3 Inst.* 139.

Or, have his clergy. *H. P. C.* 221. *3 Inst.* 139. 183.

Otherwise, if after attainder. *H. P. C.* 221. *R. Ray.* 477.

So, if the principal stand mute. *H. P. C.* 221. *2 Inst.* 184.

The accessory shall not be tried before the principal be attainted.  
*H. P. C.* 222.

By the *ft. W. 1. 3 Ed. 1. 14.* exigent does not go against him, till the principal be attainted.

But now, by *ft. 1 Ann. stat. 2. c. 9.* an accessory may be tried, tho' the principal stands mute, or is admitted to clergy, or pardoned after conviction, and before attainder.

Nor, shall he be arraigned at the suit of the party, when the principal is attainted at the suit of the king. *H. P. C.* 221. *2 Inst.* 184.

Or, if the principal be attainted of another felony. *H. P. C.* 221.

But the accessory may be arraigned before the principal be attainted or appears. *H. P. C.* 222. if he consent.

Or, he may be tried before. *H. P. C.* 222.

[If the accessory by his choice is tried, before the principal, and convicted, judgment should be respited till the principal is convicted and attainted. *Foster*, 367.]

The conviction is now sufficient.

Or, if one principal be convicted, when he is charged as accessory to two, he may be tried, if the court please. *H. P. C.* 222.

And if acquitted as accessory to him, he may be afterwards tried as accessory to the other. *H. P. C.* 222.

[To convict an accessory, it is not necessary to enter into a detail of the evidence on which the principal was convicted; but if it appears that he was not guilty, the accessory shall be acquitted. *Macdaniel's Case*, 1755. *Foster*, 121. 365.]

[If the principal is convicted of petit larceny, there can be no judgment against the receiver on the *4 Geo. 1.* for there can be no accessory. *Evans's Case*, 1749, *Foster*, 73.]

[The accessory may avail himself of the insufficiency of evidence, or incompetency of witnesses, produced against the principal; and may shew that the facts charged and proved against the principal do not, in judgment of law, amount to felony; or that the principal was innocent. *Semb. Foster*, 364. & seq.]

He may be tried by the same inquest with the principal; but the inquest shall be charged to dismiss him, if the principal be acquitted. *H. P. C.* 222. *2 Inst.* 184.

And if convicted, judgment shall be first against the principal. *H. P. C.* 222.

By the *ft. 2 & 3 Ed. 6. 24.* where the stroke or poison is in one county, and the death in another, there may be an appeal against accessories in the county where the party died, tho' accessories in another county. And by the *same statute*, the accessories may be indicted in the county where they were accessories, tho' not the same county where the principal offence was committed.

[If a man is indicted as accessory before the fact, and acquitted, he may be indicted as principal, *Foster*, 361.]



If a man indicted as principal be acquitted, he cannot be afterwards indicted as accessory before. *R. Kelg, 26. H. P. C. 224.*

[But this case seems not to be law, for the reason given for it is not good. *Foster, 392. 2 Hawk. 529. Leach's edition.*]

But the court may discharge the jury before verdict. *Kelg, 26.*

And he may afterwards be indicted as accessory after. *R. Kelg, 26.*

[If a man is indicted as accessory to two, and is found accessory to one, judgment may pass on him. *Foster, 361.*]

[If the principal is erroneously attainted, and then the accessory tried, convicted, and attainted, and then the attainder of the principal reversed for error; this reverseth the attainder of the accessory, and the accessory should have a reasonable time to procure such reversal. *Foster, 366.*]

[If the principal is outlawed, and thereupon the accessory tried, convicted, and attainted, and afterwards the principal comes in, reverseth the outlawry, pleads over to the felony, and is acquitted; this reverseth the attainder of the accessory. *Foster, 367.*]

*Vide post. (Y 6, &c.)*

### (V) Approver.

(V 1.) Who shall be.

**P**ROceeding against a criminal is, by appeal, by indictment, or as approver. *H. P. C. 176.*

As to appeal, *vide title Appeal.*

As to indictment, *vide title Indictment.*

An approver is a common person, indicted for treason or felony, who confesses the indictment before plea, and then, being sworn for discovery of all treasons or felonies, enters his appeal against *participes criminis* for the offence in the same indictment. *H. P. C. 192.*

*3 Inst. 129.*

[The *participes criminis* being within the realm. *Ibid.*]

A man may be an approver, tho' he be maimed or 70 years old, whereby he cannot wage battle. *H. P. C. 192. [Vide 3 Inst. 129. Semb. cont.]*

(V 2.) Who not.

But a peer of the realm cannot be an approver. *H. P. C. 192.* [because, says Lord Coke in *3 Inst. 129.* he cannot pray a coroner, before whom alone the appeal must be taken, and this contrary to *magna charta, c. 29.* for says he in another place *2 Inst. 49.* he cannot confess the indictment but before the Lord Steward.]

Nor, an infant, idiot, *non compos*, clerk, or woman. *H. P. C. 192. 3 Inst. 129.*

[Because some of them cannot be sworn, and none of them can wage battle. *Sed vide 2 Hawk. 294.*]

Nor, a man attainted of treason or felony, because he is *hors de la ley.* *3 Inst. 129.*

So, confession, before indictment against him, does not make him an approver. *H. P. C. 193. 3 Inst. 129.*

[Nor, can he be an approver, tho' indicted, if he be not in prison. *3 Inst. 130.*]

So,

So, if he plead to the indictment, he cannot be an approver for he appears false. *H. P. C.* 193. [*Sed vide 2 H. P. C.* 228, 229. which seems *contra 2 Hawk.* 295.]

Nor, an appellee in an appeal. *H. P. C.* 193. 3 *Inst.* 129.

And therefore, if there be an appeal against him after the indictment confessed, the approvement ceases. *H. P. C.* 193. 3 *Inst.* 129.

Nor, an appellee of an approver. *H. P. C.* 193.

[It must be before such a court as has power to appoint a coroner, as justices of the *King's-Bench*, of gaol delivery or in *eyre*, or those of a royal franchise, as a county palatine, or the royal franchise of *Ely*, where the bishop has justices and coroners of his own making. 2 *H. P. C.* 229.]

So, a person, indicted before justice of peace in a town or leet, cannot be an approver. *H. P. C.* 194. 3 *Inst.* 130.

[Because they have no authority to assign a coroner.]

And if the appeal be for an offence not contained in the same indictment, it will be a detection, but no approvement. *H. P. C.* 194. 3 *Inst.* 130.

Tho' of an accessory to the same offence. *H. P. C.* 194.

[But as the oath is general to discover all the treasons and felonies he knows, if he accuse any persons of crimes of a different nature from his own, whether in the same, or a foreign county, his accusation will be a reasonable ground to carry on a prosecution against them for such crimes, tho' it be not of itself sufficient to put them to a trial. 2 *Hawk.* 296.]

And it shall be in the discretion of the court, whether he shall be allowed to be an approver. *H. P. C.* 194. 3 *Inst.* 129.

[For it may appear to the court, on his confession, that he is a principal and tempted the others, or other reasons may appear why he should not be admitted. *Corup.* 335.]

### (V 3.) Proceeding upon an Approvement.

[The admission of approvers was founded on the desire of discovering great and notorious offenders, but because there is great danger that desperate villains, knowing they must be convicted, might in order to procure a respite of their own punishment, accuse honest men, the law has introduced great strictness in the proceedings. 2 *H. P. C.* 226.]

[He that would be admitted an approver must confess the indictment, in open court, and pray a coroner to be assigned to him to take his appeal; and this is regularly to be done before plea pleaded, but it has been done after *not guilty*, and as the foundation of this privilege is the discretion of the court, it seems it may be granted at any time before conviction. 2 *H. P. C.* 229. 2 *Hawk.* 295. *Foster*, 34.]

[If after *not guilty* he prays a coroner, but does not confess the felony, the inquest shall be taken. *Hale ubi supra.*]

[If before plea he only pray a coroner, and will say no more, he shall have *peine, forte, and dure.* *Id. ibid.*]

[If the court admit him, they assign him a coroner to take his appeal; they prefix a time; they deliver him out of *strait* custody that he may not pretend he made his appeal by *duress.*]

[The

[The coroner puts his appeal into form.]

[When he returns into court, if he pretend it was made by *duress*, the coroner shall be examined on oath, and if he affirm it was made *de bon gré*, the approver shall be hanged.]

[If he do not disavow the appeal, he must repeat it without the assistance of the court or any by-stander; and he shall be *hanged* if he vary in matter of moment, from which it may be presumed the appeal is feigned, as in the colour of a horse, or circumstance of time; as he shall also, if he make not his appeal in the time prefixed; or if he disavows it; or if he appeal one who by his own confession is not within the realm. 2 *H. P. C.* 230.]

An approver, if he refuses combat against the appellee, shall be drawn and hanged, as in petit treason. 3 *Inst.* 21.

*Vide Officer*, (G 6.)—(*Vide 3 Inst.* 130.)

#### (V 4.) Proceedings against the Appellee.

The coroner may award process to the sheriff against any appellee in his own county, till it come to the exigent, but to no officer but the sheriff; but when it comes to the exigent it seems questionable whether he be not restrained from proceeding by *magna carta*, c. 17. But the justices of the King's Bench may award process of outlawry as well as any other process into any county.

[And by *§. 28 Ed. 1. de appellatis*, justices of gaol delivery may award process to apprehend and try them, but it is doubtful whether that statute empowers them to award process of outlawry into a foreign county. 2 *Hawk.* 298.]

[If the sheriff return that the appellee is not found in his bailiwick, the appellor may be hanged, but process of outlawry shall issue against the appellee; and if he comes in, and the appeal was well commenced, he may be tried at the king's suit as on an indictment; but if the appeal were not well commenced, he shall be discharged. 2 *H. P. C.* 232.]

[If the appellee come in, he may be let to bail in three cases. 1. If the approver be dead. 2. If the person appealed be of good fame. 3. If the appellor wave the appeal. *Id. ibid.*]

[The appellee may take his legal exceptions to the appeal.]

[As that the appellor is not in prison but at large; that the appellor is within age, or above 70 years old, or a woman, or maimed, whereby the appellee loses the benefit of the trial by battle; that he is a clerk convicted and hath not made his purgation; or that he has abjured the realm; or that he was convicted by verdict before he appealed of the same offence.]

[He may also have all those exceptions which an appellee may have at the suit of an innocent person, for which *vide Appeal*, 2 *H. P. C.* 233.]

[If he plead to the felony, he may put himself on trial by battle, or by the country; if there be several appellees, and they join issue by battle, he must vanquish them all, or he will be hanged: but if there be several indicted of the same offence, and they appeal one of that felony, and if he vanquish one, he shall be discharged without fighting the rest; but if he be appealed of several felonies, he must fight them all.]



[If in the field, before they come to battle, the approver disavow his appeal, he shall be hanged; and the appellee discharged; but if the battle be deraigned before the disavowal; the appellee may still be proceeded against at the king's suit. 2 *H. P. C.* 234.]

[If the appellee put himself on trial by the country, the appellee must be sworn to the petty jury; but they are not bound to believe him, and if they acquit the appellee, the approver may be executed. *Id. ibid.*]

[If, pending the appeal, the king pardon the approver or appellee, the approvement ceases, and the appellee shall be discharged. 2 *Hawk.* 298.]

[And whatever be the event of the appeal, yet, if the offence be within the benefit of clergy, the guilty party shall not be excluded from it. *Id. ibid.*]

[If the approver convict all the appellees either by vanquishment or verdict, he is entitled *ex merito justicie* to his pardon for his life, and to his wages from the time of the appeal to the time of the conviction. But it is said that anciently he was not to be permitted to remain in the kingdom.]

[And by 5 *H. 4. c. 2.* if any person pray, &c. any pardon for an approver, the name of such person shall be inserted in the charter of pardon, and if the approver afterwards become a felon, the person pursuing the pardon shall forfeit 100 *l.* 2 *Hawk.* 299.]

[Great inconvenience having arisen from this practice of approvement, it has long been obsolete; but two statutes have in some offences introduced something similar, tho' differing in some material points: *st. 10 & 11 W. c. 23. s. 5.* enacts, that if any person shall commit any burglary, house-breaking, horse-stealing, or felony in any shop, warehouse, coach-house, or stable, by privately stealing any money, goods, or merchandizes to the value of 5*s.* or more, (altho' such shop, &c. be not actually broken open, and altho' the owners of such goods, &c. or any other person shall not be in such shop, &c. to be put in fear,) and, being out of prison, shall discover two or more persons who shall have committed any such offence as before described, or shall cause to be discovered and apprehended two persons or more who shall be convicted as aforesaid; every such discoverer shall be entitled to his majesty's pardon for any of the abovementioned offences which he shall have committed before such discovery made.]

And by 5 *Ann. c. 31. s. 4.* any felon discovering two or more who shall be convicted of burglary and housebreaking, beside being entitled to his majesty's pardon for all burglaries, robberies, and felonies (except murder and treason) committed by him before such discovery, shall also be entitled to a certificate (granted in the former act to any person who should apprehend and cause to be convicted such burglars, &c.) discharging him from parish and ward offices, and likewise to a reward of 40 *l.*]

[But what has more universally prevailed in the room of approvement, has been a practice of justices of peace, established by usage only, to admit an accomplice as evidence for the crown against his associates, on condition of his behaving fairly, and disclosing the whole truth, which gives a hope that he may escape punishment and be pardoned. But he is not assured of his pardon, he gives his evidence *in vinculis*, and may be prosecuted if he do not perform the conditions. *Corup.* 336.]

[But

[But he must acknowledge himself *guilty* of the offence for which he is admitted an evidence, and must make a full discovery; if he deny any knowledge of the fact, he cannot be admitted nor bailed, but may be prosecuted. *Id.* 337.]

[But if he perform the conditions, tho', for want of other evidence, the other parties are acquitted, he ought to be bailed to have an opportunity of soliciting a pardon. *Id.* 336. This pardon however extends only to the offence for which he has been admitted an evidence.]

### (W 1.) Trial *per Pares*.

**T**RIAL for a capital offence shall be by battail, by inquest, or by his peers. *H. P. C.* 254.

As, to trial by battail, *vide Battle*, (A 1, &c.)

As, to trial by jury, *vide Inquest*, (A 1, &c.)

When there shall be trial of a peer by his peers, *vide Dignity*, (F 1, 2.)—*Parliament*, (L 16, 17.)

Trial of a peer upon an impeachment, or indictment shall be before the lords in parliament. 3 *Inst.* 28. *Vide Parliament*, (L 13. 16. 18, &c.)

Trial of a common person shall be by the justices of *B. R.*

Or, by justices of gaol delivery, or upon a special commission of *oyer and terminer*. *Vide ante* (G, &c. 1. c—H).

### (W 2.) The Manner of Trial in a Criminal Case.

(W 2.) [How the prisoner shall be arraigned, *vide Indictment* (M).]

In a trial for high treason, or felony, a precept goes to the sheriff by four commissioners (*Quorum unus*) if the trial be by commission of *oyer and terminer*, commanding him, *quod venire faciat prisonar. cum indictmento*, &c. et 24 *probos & legales homines*, &c. *Proclamari faciat quod omnes sint ibi, qui sequi voluerint, & scire faciat justic. pacis*, &c. *Et quod ipse & subvicecomes ibi sint ad faciend. omnia quæ ad officia pertinent.*

After the precept returned, the grand jury sworn and charged, and the indictment found, the indicted shall be arraigned. *Vide Indictment* (M).

By the common law, treason shall be tried in the county where committed.

Foreign treason, where the offender's land lies. *H. P. C.* 15. 204. 3 *Inst.* 11.

But by the *st.* 35 *H.* 8. 2. (which is not repealed by the *st.* 1 *M.* 1.) treasons and misprisions done out of the realm shall be tried in *B. R.* or before such commissioners, and in such shire, as the king shall assign. 3 *Inst.* 11.

*Ireland* is out of the realm. *H. P. C.* 205. 3 *Inst.* 11.

If the king sign the commission, or put his signet to the warrant, it is sufficient. *H. P. C.* 205. 3 *Inst.* 11.

If *B. R.* remove after indictment, the trial shall be by a jury of the first county. *H. P. C.* 204.

By the *st.* 28 *H.* 8. 25. treasons, &c. within the admiral's jurisdiction, shall be tried at land, by commission under the great seal to the admiral, or his lieutenant and others.

By the *st.* 1 & 2 *Ph. & M.* 10. all treasons shall be tried according to the course of the common law, and not otherwise.

By the *st.* 7 *W. 3. c. 3.* a person indicted for treason, which corrupts blood, or misprision, shall have a copy of the indictment five days before trial, and a copy of the jury two days before, and make defence by counsel; and the court shall assign him two such counsel as he desires, who shall have free access.

[The benefit of this act is to be extended to all treasons working corruption of blood, created by subsequent acts of parliament. *Foster*, 223. or in other words to newly created treasons where the corruption is not saved. *Id.* 226.]

[In treason, it is good and usual to give the prisoner a copy of the indictment five days before arraignment, exclusive of that day and the day of delivery, and also of the intervening Sunday. *Foster*, 2.]

[And of the panel two days, with like exclusion. *Foster*, 230.]

[The delivery of the copy of the panel is good, tho' it is before the return of the precept. *Ibid.*]

[On affidavit of witnesses wanting for defence, the court will give time according to circumstances.]

[At common law, (and all high treasons not within 7 *W. 3. c. 3.* petty treasons, and felonies stand in this respect on the foot of common law,) a prisoner is not entitled to a copy of the indictment or panel, or any of the proceedings. *Lord Russell* had it by favour. *Lord Preston* was denied it. *Charnock*, *King*, and *Keys* were denied it after passing the act, and a fortnight before it took place. *Foster*, 228.]

[The prisoner should have a copy of the *caption*, tho' the act mentions only the indictment; but, after pleading, he cannot make objection for want of it, or any other defect in the copy. *Foster*, 229.]

[At common law no counsel is allowed on issue, guilty or not guilty, in any capital case, except on questions of law; and then only in doubtful cases. Accordingly it was refused on the trials for the assassination-plot, after the act had passed, but before it took place; and in *Sir William Perkins's* trial, the very day before it took place. 4 *State Trials*, *Foster*, 231.]

[And after the act, all high treasons not within the act, and all felonies including petty treason, with respect to the allowance of counsel and a copy of the indictment and panel, stand as they did at common law. *Id.* 229.]

[Counsel, as to matters of fact in impeachments are excepted in the act 7 *W. 3. c. 3.* and were denied to *E. Winton* in 1716, and to *Lord Lovat* in 1746, *Foster*, 232.]

[But by *st.* 20 *G. 2. c. 30.* persons impeached of high treason, working corruption of blood, or of misprision of such treason, may make their full defence by two counsel.]

[On trial of issue, not of guilty or not guilty, but of collateral facts, prisoners under a capital charge of treason or felony, were always entitled to the full assistance of counsel. *Strafford's Case*, 1 *H. 7. Johnson's Case*, *Str.* 824. *Harvey*, *P.* 20 *G. 2. &c.* *Foster*, 232. *Vide Doug.* 590.]

[By 7 *Ann. c. 21. st.* 11. on indictment for high treason or misprision, after the death of the pretender (*who died in 1766*), a copy of the indictment with a list of the witnesses to be produced at the trial



trial for proving the indictment, and of the jury mentioning the names, professions, and places of abode of the witnesses and jurors shall be delivered before two witnesses, *ten days* before the trial.]

[By *stat. 6 G. 3. c. 53.* it is enacted, that this clause shall not extend to indictments for counterfeiting the coin, the great or privy seal, sign manual, or privy signet, or any indictment of high treason, or proceedings thereon against offenders to be tried on such evidence, and in such manner as is allowed against offenders for counterfeiting the coin.]

[On a mere commission of *oyer and terminer*, no panel is ordered, till defendant has pleaded to issue, and issue is joined, and it is then done by precept in the nature of a *venire*; and if there is want of jurors, a *habeas corpora* with a *tales* may possibly issue. *Foster*, 63.]

[No *tales* can be granted on a commission of gaol delivery. *Ibid.*]

[He may challenge thirty-five without cause. *H. P. C.* 260.]

[The court will order, that the whole panel may be read over, before any juryman is brought to the book, that the prisoner may the better know how to make his challenges. *Townley's Case*, 1746, *Foster*, 7.]

[If the prisoner challenges peremptorily, and for cause, so many jurors that there are not sufficient left on the panel to proceed to trial, the court (if there is a commission of gaol delivery as well as *oyer and terminer*) may *ore tenus* order a new panel and adjourn for some days. And the sheriff may return those who had been challenged or sworn before, or he may return all new ones. *Coake's Case*, 4 *State Trials*, 728. *Foster*, 63.]

[If the commission is by virtue of an act of parliament, both which are recited in the caption of the indictment, it is not necessary that it should set forth the *teste* of the commission. *Foster*, 11.]

[If the act impowers the king to grant commissions to try persons in custody before a future day, it is not necessary that the indictment set forth that the defendants are in custody; if it appears on the record that they were in custody before the day, judgment shall not be arrested. *Foster*, 12.]

[In a capital case, where the prisoner may make his full defence by counsel, the court may discharge the jury on the motion of prisoner's counsel, and at his own request, and with the consent of the attorney-general, *before evidence given*, in order to let the prisoner in to a defence, which, in the opinion of the court, he could not have been otherwise let into. *Kinloch's Case*, 1746, *Foster*, 17. 31. 35.]

[But not after evidence given, in order to preferring a new indictment better suited to the nature of the case, where thro' ignorance or collusion of officer, or mistake of prosecutor, the fact varies from the real fact, or comes short of it in point of guilt. *Semb.* 30. Tho' it hath been done, particularly in *Ann Hawkins's Case*, *Id.* 38.]

[Yet if a man is indicted for murder, and it comes out in evidence, that he stood in such relation as to render the offence petty treason, the court may discharge the jury of that indictment, and order a fresh one for petty treason. *Foster*, 328.]

[But not where undue practices appear to have been used to keep material witnesses out of the way, or where such witnesses have been prevented by sudden and unforeseen accident. *Semb.* Tho' this also has been done. *Foster*, 30.]

[Nor,

[Nor, after evidence given and concluded on the part of the crown, for want of evidence to convict, and in order to bring the prisoner to a second trial, when the crown may be better prepared. Tho' this has also been done, particularly in *Whitebread* and *Fenwick's Case*, *Foster*, 30.]

[Nor, on the bare consent of the prisoner unassisted by counsel, and to his own prejudice. After evidence given on both sides and concluded. Tho' done in *Mansell's Case*, *Ibid.*]

[If a woman on her trial is taken with the pains of labour, the jury may be discharged of her. *Meadow's Case*, 1750, *Foster*, 76.]

[If one convicted and attainted of high treason before commissioners, escapes, and is afterwards retaken, he shall be brought to the bar of B. R. by *habeas corpus*, and the record of his conviction and attainder removed thither by *certiorari*: they shall be read to him; the attorney-general prays execution, and he shall be asked, why execution, &c. He may have counsel, but not a copy of the record. His counsel may have a rule for access to him. If he pleads he is not the person, the attorney-general may reply *ore tenus*, and a *venire* awarded returnable *instantier*, and so the trial, unless grounds for postponing laid before the court. He hath no peremptory challenge. He may have assistance of counsel, who may cross-examine. If the jury find against him, he shall not have time, before award of execution; for his plea being peremptory, the verdict is conclusive, and nothing remains but award of execution; (unless in case of parliamentary pardon, with clause to avail himself thereof on general issue. *Semb.*) *Ratcliff's Case*, 1746, *Foster*, 40.]

[If felon convicted, and sentence of death passed, breaks gaol, commits murder, is retaken, and in custody on the former conviction, and detained on warrant from the coroner, is brought by *habeas corpus* before B. R. they proceed as in *Ratcliff's case*, the second judge pronounces award of execution, on the former sentence; the court will not name a day, and a rule is made to deliver him to the sheriff of the county, who executes when he thinks proper. *Rex v. Rogers*, &c. *M. 6 G. 3. 3 B. M.* 1809.]

[Prisoners may be kept chained during such proceeding, if danger is apprehended. *Ibid.*]

[When judgment has been once pronounced, it is not pronounced again, but execution awarded. *Ibid.*]

[On attainder by name, by act of parliament, the tenor of the act is removed by *certiorari* into *Chancery*, and thence sent by *mittimus* into B. R. and the judgment of high treason is pronounced by the chief justice, as an award of execution grounded on the act of attainder. *Ibid.* *John Murray of Broughton's Case*, 1746, *Foster*, 47. *Dr. Cameron's Case*, 1753, *Foster*, 109.]

[And the prisoner is brought up by *habeas corpus ad subjiciendum et recipiendum*, and if the attainder is by a general act, (as for the smugglers,) the several matters requisite to bring him within the act, must be suggested on the roll, to ground a prayer of execution; and he may traverse them, and the *onus probandi* lies on the crown. *Harvey's Case*, *P. 20 G. 2. Foster*, 51.]

[He cannot take advantage of insufficiency of suggestion on motion, but must demur to it. *Ibid.*]

[If he pleads, he must do it *instante* and *ore tenus*, and the attorney-general replies so. *Foster*, 51.]

[The trial may be put off to a future day. *Ibid.*]

[He is not entitled to a copy of the suggestion. *Ibid.*]

[If the act requires, that a proclamation to surrender should be made and fixed up at two market towns near the place, and it is done at one near it, and at two others at a considerable distance, tho' there are several much nearer; it is not sufficient, and the attorney-general takes nothing by his motion. *Ibid.* 1 *Will.* 154.]

[If *A.* and *B.* are indicted for murder, and both plead not guilty; and before trial another indictment is preferred for the same fact against *A.* for petty treason, and *B.* for murder, they must plead to the second indictment; *autrefois arraign* is not a plea in this case: but the judges must take care that they do not undergo two trials for the same fact. *Case of Swan and Jeffreys*, 1752, *Foster*, 104.]

[And therefore the court may (by consent of the king's counsel, or without,) order the first indictment to be quashed, and proceed on the second. *Ibid.*]

[The *st.* 1 *Ed.* 6. *c.* 12. and 5 & 6 *Ed.* 6. *c.* 11. (but not 7 *W.* 3. *c.* 3.) extend to petit treason, therefore there must be two witnesses; the witnesses, if *living*, must be examined in open court. Depositions taken by the coroner, or informations before justices of peace, and certified to the gaol delivery, pursuant to statute, whereon to ground a conviction for petit treason; if the party be living, tho' unable to travel, or kept out of the way by prisoners, are not sufficient. But in such cases, a man indicted for petit treason may be found guilty of murder. *Foster*, 328. 337.]

[Petit treason (with respect to the number of witnesses) stands singly on the foot of the statutes of *Ed.* 6. which are not repealed by 1 & 2 *Ph.* & *M.* which was intended in favour of the subject, and not against him. And accordingly the statutes of 32 *H.* 8. *c.* 4. 33 *H.* 8. *c.* 20. 33 *H.* 8. *c.* 23. as far as concerns treasons committed in *England* and *Wales*, are considered as repealed by it; but 28 & 35 *H.* 8. for trial of treason committed on the high seas, and 33 *H.* 8. as far as concerns treason in foreign parts, are not repealed. *Foster*, 237.]

As to the indictment and process upon it, *vide Indictment* (*A.* & *C.* —).

(*W.* 3.) *How he shall plead.*] The indicted may demur, or plead to the indictment.

A demurrer is a confession of the offence as alleged; and if the indictment be sufficient, there shall be judgment and execution against the prisoner. *H. P. C.* 243.

And now, by the *st.* 7 *W.* 3. 3. in high treason, or misprision, the indictment, process upon it, or return may be quashed, before any evidence given, upon motion of the prisoner or his counsel, for mis-writing, mis-spelling, false or improper *Latin*.

[If the prisoner would avail himself of defect in the indictment by mis-writing, &c. tho' the act requires only that he should take his exceptions before evidence given in open court; yet practice has settled that it shall be before plea pleaded. And in *Vaughan's case*, *Sullivan's* case,



case, and *Laver's* case, the court refused to hear such exceptions after plea; and tho' in *Cranborne's* case it was admitted after plea, and in *Rockwood's* case after jury sworn, yet it was of indulgence on a new act. *Foster*, 230.]

If he plead, he may confess the indictment and plead guilty. *St. P. C.* 142. *Vide Indictment* (K).

Or, he may plead in abatement; as, misnomer, &c.

If he plead a misnomer of the surname, he ought to plead over to the felony. *H. P. C.* 243.

If misnomer of the christian name, he must give his true name; and if the attorney-general confesses the misnomer, the indictment shall be quashed; but he may be immediately indicted by his true name. *H. P. C.* 243.

Plea of sanctuary is taken away by *st. 21 Jac.* *Vide Abjuration* (D).

Or, he may plead in bar, as, *autrefois acquit*, *autrefois convict* or *attaint*. *St. P. C.* 105. 107. *H. P. C.* 244. 247. *Vide Indictment* (L).

A pardon. *St. P. C.* 99. *H. P. C.* 252.

[A capitulation on surrender of a town by rebels, is no defence at law. *Townley's Case*, 1746, *Foster*, 7.]

[Force, for fear of houses being burnt or goods destroyed, is no excuse for joining and marching with rebels; the only force that doth excuse, is force on the person, and present fear of death, which must continue all the time the party remains with them. *McGrowther's Case*, 1746, *Foster*, 13.]

Or, the general issue, not guilty. *St. P. C.* 151. *a.* *H. P. C.* 254. *Vide Indictment* (L).

[On not guilty pleaded, prisoner may have the benefit of any thing tending to shew that his case is not within the act, empowering the king to grant commissions to try treasons in any county: as, the act of union, that the private rights of natives of Scotland shall not be altered; except for the evident utility of the subjects within Scotland. *Kinloch's Case*, 1746, *Foster*, 15. *Contra Willes C. J.*]

After not guilty pleaded and recorded, the prisoner, *relucta verificatione*, may confess the indictment. *R. R. Kels*, 11.

So, if he plead a frivolous plea, and will say nothing more, the court will give judgment for treason upon the *nil dicit*. *R. Dy.* 300. *b.*

If there are several in the same indictment, some may be tried, others confess after plea, others shall be outlawed. *Kels*, 11.

(W 4.) *How the evidence shall be given.*] After plea what process shall be against the jurors, *vide in Enquest*, (C 1, &c.) What challenge, *vide in Challenge*, (B—C 1, 2.)

By the *st. 1 Ed. 6. 12.* and *5 & 6 Ed. 6. 11.* no person shall be indicted or convicted for treason, or misprision of treason, unless accused by two sufficient and lawful witnesses, or he willingly, without violence, confesses the same.

So, by the *st. 1 El. 1.* for offences by that act.

And by the *st. 5 & 6 Ed. 6. 11.* the accusers, if living at the time of arraignment, shall be brought in person before the party accused, and avow what they have to say to prove him guilty of the indictment.

So, by the *st.* 1 *El.* 1.

So, by the *st.* 7 *W.* 3. 3. no person shall be indicted, tried, or attainted of treason, whereby corruption of blood ensues or misprision of such treason, but by the oaths of two lawful witnesses to the same overt act, or one to one overt act and one to another overt act of the same treason, unless without violence in open court he confesses the same, or stand mute, or refuse to plead, or in cases of high treason challenge above thirty-five of the jury peremptorily.

[The evidence of one witness to an overt act, and the declaration of the prisoner to others after he has surrendered, and is in a prison appointed for the rebel officers, that he was a lieutenant of the rebels, is sufficient to convict; for this declaration of the prisoner is not a bare confession after the fact, but an evidence of the fact itself; viz. that he was a lieutenant among the rebels. *Barwick's Case*, 1746, *Foster*, 10. 243.]

[Declarations of a child of ten years, before the coroner, before a justice, and two other persons whilst in gaol, are evidence proper to be left to a jury. *York's Case*, 1748, *Foster*, 70.]

[A collateral fact not tending to the proof of the overt act, may be proved by one witness. *Per Holt, C. J. Vaughan's Case*, 5 *State Trials*. *Foster*, 240. *Smith's Case*, 7 *Ann.* *Willis's Case*, 8 *State Trials*. *Foster*, 242.]

So, by the same statute, if admitted to trial after outlawry for such treason.

And if two treasons of divers species are in the same indictment, one witness to one, and another to the other species of treason, shall not be two witnesses to the same treason within the intent of this act.

And the person so indicted, &c. shall be admitted to make defence by counsel, and by witnesses on oath.

And no evidence shall be of any overt act not laid in the indictment. Nor shall any be prosecuted for treason, or misprision done in *England* or *Wales*, except as to assassination of the king's person, unless the indictment be found within three years after the offence committed. [(*Vide ante*, (K 1.))]

But this statute extends not to counterfeiting the coin, great seal, privy seal, sign manual, or privy signet. To which treasons neither does the *st.* 1 & 2 *Ph.* & *M.* 10. extend. *Vide Rastal, Treason* 24.

[Nor, high treason by 5 *Eliz.* c. 1. concerning the papal supremacy, and by 18 *Eliz.* c. 1. 8 & 9 *W.* 3. c. 25. and 15 & 16 *Geo.* 2. c. 28. touching the coin. *Foster*, 222.]

[It extends to such treason as ordinarily worketh corruption of blood, if such treason is committed on the high seas, and the proceeding is under *stat. H.* 8. even supposing corruption of blood is not wrought in such proceeding. *Foster*, 226.]

[Evidence of overt acts of treason after the day laid in the indictment, is good evidence of the overt acts laid in the indictment; the time not being material, if the treason is proved to be committed before the bill is found. *Townley's Case*, 1746, *Foster*, 7. *Ld. Balmerino's Case*, 1746, *Foster*, 9.]

[But, if on indictment for adhering, the overt act laid is cruising on the king's subjects in ship *A.* cruising in ship *B.* is not evidence of it. *Vaughan's Case*, 5 *State Trials*. *Foster*, 246.]

[One overt act must be proved in the county where all the overt acts

acts are laid, and then overt acts done in another county may be given in evidence. *Foster*, 246.]

[A letter dated from a place in the county where the treason is laid, is sufficient proof of an overt act in that county. *Rex v. Hensley*, T. 31 Geo. 2. 1 B. M. 642.]

And by the *st.* 1 Ann. 9. all witnesses on trial for treason, or felony, shall give evidence on oath.

The force of the *st.* 1 Ed. 6. 12. and 5 & 6 Ed. 6. 11. was not taken away by the *st.* 1 & 2 Ph. & M. 10. H. P. C. 262. *Dub. Kelg*, 49. 18. *Vide* 2 Jon. 233. H. P. C. 208.

Testimony of hearsay shall not be allowed in treason, or felony. H. P. C. 262.

[Papers found in the possession of defendant, and proved to be his hand, may be read. *Rex v. Hensley*, T. 31 Geo. 2. 1 B. M. 642.]

But by the common law one witness in treason was sufficient. *Kelg*, 49.

So now, by the *st.* 1 & 2 Ph. & M. 11. for treason in counterfeit-ing the coin. H. P. C. 262. *Kelg*, 50.

So, in treason for clipping, &c. R. 2 Jon. 233.

So, one witness is sufficient in petit treason, or felony.

[But this seems contrary to the statutes of Ed. 6. with respect to petty treason.]

So, since the statutes 1 & 5 & 6 Ed. 6. and also since the *st.* 7 W. 3. one witness is sufficient for one overt act, and another for another overt act of the same treason. *Kelg*, 9.

So, the two witnesses who give evidence for the finding of the indictment, are sufficient witnesses upon the trial. *Kelg*, 18.

So, by the *st.* 1 & 2 Ph. & M. 13. and 2 & 3 Ph. & M. 10. justices of peace, before whom any is brought for felony, shall take examination of the prisoner and such as bring him, of the circumstances of the fact, and certify them to the justices of gaol delivery, &c.

This examination, subscribed by the prisoner, shall be read upon the trial as evidence against him. H. P. C. 262.

So, the information of any, taken by a justice of peace upon oath, being proved by the justice or his clerk, if the witness himself be dead, or beyond sea. H. P. C. 263. *Semb. cont.* 2 Jon. 53.

So, a deposition taken before the coroner, if the witness be dead, or beyond sea. R. 2 Jon. 53.

So, in treason, confession of the prisoner, upon examination before a justice of peace, shall be evidence against himself. *Kelg*, 18.

Or, before a privy counsellor, tho' he be not a justice of peace, *Kelg*, 19.

So, two witnesses of his confession upon such examination are sufficient, without other witnesses to prove the treason, notwithstanding the *st.* 1 Ed. 6. and 5 & 6 Ed. 6. for the words, *unless without violence he confesses*, &c. are intended of a confession upon his examination, tho' he deny it in court. R. *Kelg*, 18.

[Whether a confession, in the case of those treasons which are entitled to the benefit of the *st.* 7 W. 3. and what kind of confession, whether to a magistrate during examination, or other person having authority (and what authority) to take it, or to other persons, shall be evidence to convict, or for what purpose, seems not well settled.



*Gregg's Case, Francia's Case, Willis's Case, Vaughan's Case, Smith's Case, Barwick's Case, &c. Foster, 240. et seq.*

[The rack or torture is against law, and cannot be justified by any usage: It was first introduced into the Tower, temp. H. 6. practised to the end of *Eliz.* at least; proposed in council on *Felton's case*, but declared by all the judges to be illegal. *Foster, 244.*]

### (X) Judgment.

#### (X 1.) In High Treason.

THE judgment in high treason shall be, that the man be drawn, hanged, his entrails taken out and burnt, his head cut off, his body quartered, and his head and quarters hanged up. *H. P. C. 268. Ca. Parl. 131. Vide Forfeiture, (B 1, 2, &c.)*

*Quod secreta membra amputentur*, is also a necessary part of the judgment, but it need not be entred upon the roll. *R. inter the King and Tucker, P. 6 W. & M. B. R. Skin. 442.*

The judgment for counterfeiting the coin is only to be drawn and hanged. *H. P. C. 268.*

So, for clipping or diminishing. *Dy. 230. R. 2 Jon. 233. 1 Vint. 254. Ray. 234.*

So, the judgment in treason for a woman, in cases of the coin, is to be drawn, and burnt. *H. P. C. 268.*

If any essential part of the judgment be omitted, the judgment shall be reversed: as, *quod interiora ipso vivente comburentur. R. 4 Mod. 400. Ca. Parl. 136, 7.*

The judgment for high treason shall be given by the chief judge present, not by the recorder. *Kelg. 11.*

For treason a man forfeits all his lands and tenements, goods and chattels to the king. *Co. Lit. 41. a. 3 Inst. 211. Vide Forfeiture, (B 1, 2.)*

Also, his wife shall lose her dower, and his blood is corrupted. *Co. Lit. 41. a. 3 Inst. 211.*

But the blood is not corrupted, nor dower lost; for treason against the *st. 5 El. 11.* or *18 El. 1.* in the case of the coin.

Nor, for treason against *5 El. 1.*

[The king may not only remit part of the judgment, but he may alter it in mitigation, tho' not in aggravation. Thus ladies of distinction have never been burnt, but beheaded, by warrant from the crown. *Foster, 268.*]

As to judgment in petit treason, *vide ante, (L 3.)*

#### (X 2.) Judgment, if a man stand mute.

In high treason, if the party stand mute, he shall have the same judgment, as if convicted. *H. P. C. 226. Dy. 205. a. 3 Inst. 217.*

So, in an appeal. *H. P. C. 226.*

So, by the *st. 33 H. 8. 12.* for treasons and felonies within the verge.

So, if he be mute by the act of God, he shall be tried and have judgment, as if he had pleaded. *H. P. C. 225.*

So, after conviction, if he stand mute, when asked, what he can say why there should not be execution, he shall be executed. *H. P. C. 226.*

So,

So, if he had formerly pleaded. *H. P. C.* 225, 226.

But in other cases of felony he shall have *peine forte & dure*, viz. he shall be remanded to prison, and being naked in a dark place with his hands and legs extended, weights shall be put upon his body till he answer. *H. P. C.* 227.

A man stands mute, where of malice he will not plead to the indictment. *H. P. C.* 225.

Or, challenges above 35. *H. P. C.* 226.

If he speaks, but will not plead directly, or put himself upon the country. *H. P. C.* 226.

If he cut out his tongue to disable his speaking. *H. P. C.* 225.

[By *stat. 12 Geo. 3. c. 20.* person standing mute on arraignment for felony or piracy shall be convicted, and have judgment and execution, &c. as if convicted by verdict or confession. This extends to *America.*]

### (X 3.) Judgment in Felony.

The judgment in felony is, *quod suspendatur per collum quousque sit mortuus*, except petit larceny, where it is, *quod flagelletur*. *H. P. C.* 268, 269. 3 *Inst.* 211. *Vide Forfeiture*, (B 3, &c.)

And the king, tho' he may pardon the whole or any part of the judgment, cannot alter it to beheading, or any other death. *H. P. C.* 268. *R. 12 Co.* 130.

And the court cannot alter the punishment by command of the king, or consent of the prisoner.

And therefore, where *Felton*, convicted of the murder of the *D. of Bucks*, requested that his hand might be cut off, and the king also desired it, the court could not do it. 1 *Rushw.* 640.

[The king may alter the judgment in mitigation, tho' not in aggravation. Thus persons of distinction have for ages past been beheaded for felony by warrant from the crown, and nobody complained, or thought the execution illegal. Thus it appears from the *Register* 165. *a. F. N. B.* 144. *H. 4to. Edit.* 399. *Stamf.* 198. *A.* that persons were beheaded for felony, yet the writ of *escheat* alleged they were hanged. Thus by *articuli cleri*, that persons flying to sanctuary and abjuring (a privilege never allowed but in felony) had been taken by force, and hanged or beheaded. This is part of the common law; for immemorial usage, founded in mercy, and never complained of, is sufficient to shew what is common law. *Foster*, 268.]

But by the *stat. 4 Geo. 11.* any convicted for an offence entitled to the benefit of clergy, may be sent to the plantations for seven years; and for a higher offence may be pardoned, on condition he be transported for fourteen years.

[By *stat. 16 Geo. 3. c. 43.* instead of transportation, convicts may be set to hard labour on the *Thames*, or elsewhere, for not less than three nor more than ten years; this act continued by 18 *Geo. 3. c. 62.* 19 *Geo. 3. c. 54.* & *c. 74.* to the 1st of *June* 1784.]

[A man may be transported for running wool, by *stat. 4 Geo. c. 11.* tho' he was not committed for want of bail, and tho' the information had not been delivered to him or the turnkey. *Rex v. Tomkins*, in *Sc. M.* 1721, *Bunb.* 83.]

[By *stat. 8 Geo. 3. c. 15.* if the king pardons capital convict, on condition of transportation, and it is signified by secretary of state to the judge, he may make order for his immediate transportation.]

For all felony, in which there is judgment to be hanged, his blood is corrupted. *Co. L. 391. b.*

[By *ft. 25 Geo. 2. c. 37.* persons convicted of murder shall be executed next day but one after sentence, (except it be *Sunday*;) and shall be anatomised or hung in chains; this shall be a part of sentence which shall be pronounced immediately, unless cause. Till execution he shall be kept alone in a cell, and fed with bread and water only, unless allowed otherwise. Gaoler offending forfeits his office and 20*l.*]

He forfeits his goods and chattels, his lands and tenements. *Co. L. 391. a. 41. a. Vide Forfeiture, (B 3, &c.)*

The goods and chattels are forfeited by the conviction. *Co. L. 391. a.*

The lands and tenements, not till attainder. *Co. L. 391. a.*

And the forfeiture, as to the *mesne* profits, relates to the judgment. *Co. L. 390. b.*

As to *mesne* charges and incumbrances, to the time of the offence alleged in the indictment. *Co. L. 390. b. Stamf. 192. a.*

Unless it be in the case of an attainder by outlawry upon an appeal; for then it relates only to the time of the outlawry, for no time is mentioned in the writ of appeal. *Co. L. 390. b.*

And the felon shall live upon his goods and lands during his life.

But in petit larceny he forfeits only his goods. *Co. L. 391. a.*

So, the blood is not corrupted, nor dower lost, in felony contrary to the *ft. 8 El. 3.* of exportation of sheep a second time; the *ft. 31 El. 4.* of embezzlement of ammunition, &c. the *ft. 35 El. 1.* of refusing abjuration, &c. the *ft. 1 Jac. 11.* of polygamy; the *ft. 1 Jac. 12.* of witchcraft.

If a statute saves the descent to the heir, the blood is not corrupted; and if it saves the corruption of blood, the inheritance is preserved to the heir. *H. P. C. 8.*

### (Y) Clergy.

(Y 1.) When allowed.

THE allowance of clergy is a privilege, which a priest, or any other who by possibility may be a priest, may claim when arraigned for felony, to be delivered to the ordinary to make purgation of the same offence. *St. P. C. 123. C.*

And it commenced by the canon law, which does not allow a clerk to be tried *coram iudice seculari*, and is confirmed by the *ft. Art. Cleri*, and other acts of parliament. *St. 123. b. C. Kelg, 99, 100. Eq. Ca. 272. 2 Inst. 636.*

It was afterwards extended to inferior orders. *Kelg, 100.*

And afterwards, to all who read as clerks, which was the test, or trial, whether they were clerks or not. *Kelg, 101.*

And it shall be allowed to every one, who by dispensation, or possibility may be a clerk; as, to a man excommunicated. *H. P. C. 229. 11 Co. 29. b.*

One of the *Greek* church. *H. P. C. 229.*

One who had abjured the realm, after his return. *H. P. C. 230.*

Or, had committed sacrilege, if the ordinary will claim him. *St. 123. D. 2 Inst. 114.*



So, it shall be allowed in all crimes, except high treason, where it is not taken away by statute. 2 *Inst.* 635. *H. P. C.* 230.

And by the common law, it was to be allowed *toties quoties*, till the *st.* 4 *H.* 7. 13. *St. P. C.* 135. *d.*

So, since that statute, to a clerk *infra sacros ordines.* *St.* 135. *D.*

And if a statute creates a new felony, clergy shall be allowed in it, unless it be expressly ousted. *H. P. C.* 230.

And if clergy is ousted by a statute, the indictment must pursue the act. *H. P. C.* 231.

And taking it away from the principal does not take it away from the accessory, unless he be mentioned. *H. P. C.* 231.

When an offence is within clergy, it shall be allowed, tho' he be convicted by verdict or confession, tho' he stand mute, or challenge above thirty-five. *H. P. C.* 231.

(Y 2.) When not.

But clergy shall not be allowed to one, who by no possibility can be a priest: as, to a woman, tho' she be a nun. *St.* 123. *D.* *H. P. C.* 229. 11 *Co.* 29. *b.*

Nor, to a Turk, Jew, or other infidel. *H. P. C.* 229. 11 *Co.* 29. *b.*

Nor, to a man blind, or maimed. *St.* 123. *D.* *H. P. C.* 229. 11 *Co.* 29. *b.*

[The persons mentioned in these three paragraphs are all at this day entitled to their clergy. *Vide* 2 *H. P. C.* 373. 2 *Hawk.* 475. *Foster,* 306.]

So, a man who had committed sacrilege, shall not have his clergy, if the ordinary will not demand him; if he be arraigned for that or any other crime. *St. P. C.* 123. *D.* 11 *Co.* 29. *b.* 2 *Inst.* 114.

So, by the *st.* 4 *H.* 7. 13. a man not *infra sacros ordines* shall not be admitted to his clergy, if once admitted to it, and he be eftsoon arraigned of any such offence.

And therefore, to his prayer of clergy, it may be counterpleaded, that he formerly had his clergy. *St. P. C.* 135. *B.*

Yet, by the *st.* 4 *H.* 7. 13. the court upon such a counterplea shall give a day to produce a certificate, or letters of his orders.

By the *st.* 34 & 35 *H.* 8. 3. the transcript of any conviction, or attainer upon an indictment, &c. which ought to be made by every clerk of the crown, clerk of the peace, or clerk of assize into *B. R.* shall be as effectual as the record itself.

So, by the *st.* 21 *Jac.* 6. a woman convicted by confession or verdict for felony under the value of 10*s.* or as accessory in a case where a man shall be allowed his clergy, shall for the first offence be branded by the gaoler in court with a *T.* on the left thumb.

And may be punished by imprisonment, stocks, whipping, or house of correction, not above a year, as the judge shall think fit.

[By statutes 3 & 4 *W. & M.* c. 9. s. 6. and 4 & 5 *W. & M.* c. 24. s. 13. made perpetual by 6 & 7 *W.* 3. c. 14. s. 1. if a woman be convicted of the same or like offence for which a man should have the benefit of his clergy, she shall not suffer death for the first offence but shall have the benefit of the statutes once, and suffer the same punishment that a man should suffer if his clergy were allowed him in the like case.]

[By

[By 5 *Anne*, c. 6. § 6. any person convicted of a felony entitled to the benefit of clergy shall not be required to read, but shall have it without reading.]

By the *st.* 3 & 4 *W. & M.* 9. the clerk of the crown, or of the peace, or of assize, where man (or woman) hath been convicted, who once had clergy, (for the benefit of this act, which allows a woman to be burnt in the hand where a man shall have clergy,) at the request of the prosecutor or any other shall certify a transcript, briefly containing the effect of the indictment, conviction and allowance of clergy, addition of person, and certainty of the offence.

And such certificate shall be proof to the judge, that the person once had clergy, or the benefit of clergy.

[In new felonies by statute, ousting clergy, where aiders and abettors are not named, yet if terms are used well known to include them, they are ousted. So, by 1 *Ed.* 6. c. 12. for murder, and highway robbery. 18 *Eliz.* c. 7. rape, ravishment, and burglary. Buggery, 25 *H.* 8. c. 6. 5 *Eliz.* c. 17. *Foster*, 357, 358.]

[When the statute takes away clergy from the offence generally, without other circumstances, it is taken from the offender under every circumstance. *Foster*, 358.]

(Y 3.) *In high treason.*] Clergy was not allowed in high treason, by the common law. 11 *Co.* 29. b. 2 *Inst.* 150. 629. 634.

Nor, in sacrilege. 11 *Co.* 29. b. 2 *Inst.* 150.

But in all other crimes it was allowed. 2 *Inst.* 635.

And by the *st. de clero*, 25 *Ed.* 3, 4. all clerks, secular or religious, convicted for any treason or felonies, touching other persons than the king, shall have clergy.

But if convicted of any species of high treason, tho' it does not relate to the person of the king, clergy is allowable within this statute. 2 *Inst.* 636. *H. P. C.* 230.

[All treasons which in the judgment of the legislature have a direct tendency to disturb the peace of the kingdom, are ousted of clergy, as touching the *royal majesty of the king*; but offences of a more private nature, which, for their odiousness or public example, are made treason, and which do not touch the person of the king or his royal majesty, are not ousted without express words. *Foster*, 191.]

(Y 4.) *In petit treason.*] By the *st.* 23 *H.* 8. 1. revived by the *st.* 5 & 6 *Ed.* 6. 10. (*Vide* 11 *Co.* 30.) the principal in petit treason, convicted by verdict, or confession, is ousted of clergy. *Vide H. P. C.* 232.

[The statute 23 *H.* 8. 1. is not revived, and the statute 25 *H.* 8. 3. is not revived *in toto*, by 5 & 6 *Ed.* 6. *Foster*, 330.]

And by the *st.* 25 *H.* 8. 3. tho' he stand mute, challenge above twenty, or do not answer directly.

So, in an appeal, if he be convicted by verdict, or confession, but not otherwise. *H. P. C.* 232.

And by the *st.* 3 & 4 *W. & M.* 9. where a person is excluded clergy when convicted by verdict, or confession, he shall lose it if he stand mute, will not answer directly to the felony, or challenge peremptorily above twenty.

By

By the *st.* 23 *H. 8. 1.* and 4 & 5 *Ph. & M. 4.* an accessory before, maliciously, is ousted of his clergy. *H. P. C. 232. 11 Co. 30. a.*

[The *st.* 1 *Ed. 6.* ousts of clergy persons guilty of petit treason under the name of wilful murder. *Foster, 329.*]

[It is the only statute which ousts of clergy persons in holy orders guilty of petit treason. *Foster, 330.*]

(Y 5.) *In murder.*] By the *st.* 23 *H. 8. 1.* 25 *H. 8. 3.* 1 *Ed. 6. 12.* in murder of malice prepense, in all cases, the principal is ousted of clergy.

And by the *st.* 4 & 5 *Ph. & M. 4.* an accessory before, of malice.

And by the *st.* 1 *Jac. 8.* he who stabs one having no weapon drawn, nor first striking, tho' no malice forethought.

So, if he who stabs, struck first, tho' the other struck him before he was stabbed. *R. per 10 J. Jon. 340.*

(Y 6.) *In arson.*] By the *st.* 23 *H. 8. 1.* an arson of an house or barn with corn, the principal is ousted of clergy, if convicted by verdict, or confession. *11 Co. 30. Sav. 46. cont. (Vide H. P. C. 233.)*

And by the *st.* 25 *H. 8. 3.* if he stand mute, answer not directly, or challenge above twenty. (*Vide H. P. C. 233. 11 Co. 30. b.*)

And by the *st.* 4 & 5 *Ph. & M. 4.* an accessory before, of malice.

[The *st.* 23 *H. 8.* and 25 *H. 8.* ousted arson, but 1 *Ed. 6.* restored clergy, but 4 & 5 *Ph. & M.* taking away clergy from the accessory before, does by necessary consequence take it from the principal. *Foster, 331. 333.*]

But upon an outlawry, he shall have clergy. *H. P. C. 233. (Vide 11 Co. 30. b.)*

(Y 7.) *In burglary.*] By the *st.* 23 *H. 8. 1.* and 1 *Ed. 6. 12.* a burglar, where any person is within the house and put in fear, convicted by verdict or confession, or not answering directly, or standing mute, and by the *st.* 25 *H. 8. 3.* challenging above twenty, is ousted of clergy.

By the *st.* 5 & 6 *Ed. 6. 9.* a burglar in a dwelling-house, or in a booth, or tent in a fair, or market, any person being within, tho' not put in fear, is excluded clergy.

By the *st.* 18 *El. 7.* a convict of any manner of burglary by verdict, or confession, or outlawry, is excluded clergy.

By the *st.* 3 & 4 *W. & M. 9.* if he stand mute, answer not directly, or challenge above twenty,

And by the *same statute*, an accessory before is excluded clergy.

By the *st.* 12 *Ann. 7.* any who steals money, or goods of 40*s.* value in a dwelling-house, or out-house belonging.

Or, enters an house of intent to commit felony, without breaking; or commits felony in an house and breaks it in the night to get out, is excluded clergy.

(Y 8.) *In robbery.*] By the *st.* 23 *H. 8. 1.* and 1 *Ed. 6. 12.* a convict by verdict, or confession for a robbery in or near an highway, is ousted of clergy.

And



And by the *ft.* 25 *H. 8.* 3. if he stand mute, answer not directly, or challenge above twenty.

And by the *ft.* 4 & 5 *Ph. & M.* 4. an accessory before.

If an indictment says, *in quâdam viâ pedestri*, the offence is ousted of clergy. *H. P. C.* 242.

(Y 9.) *In larceny, from the person.*] By the *ft.* 8 *El.* 4. a person convicted on an appeal or indictment, by verdict, confession, or outlawry, for stealing any money or goods from the person of another, privily and without his knowledge, or standing mute, not answering directly, or challenging above twenty, loses the benefit of clergy.

[Only the person stealing, not he who is present, aiding and abetting, is ousted. *Foster*, 356.]

(Y 10.) *Within an house.*] By the *ft.* 23 *H. 8.* 1. a convict by verdict, or confession of robbing any person in a dwelling-house, the owner, his wife, children, or servants within, and put in fear, is excluded clergy.

So, by the *ft.* 25 *H. 8.* 3. if he stand mute, answer not directly, or challenge above 20.

By the *ft.* 5 & 6 *Ed.* 6. 9. a convict, by verdict, or confession of robbing in a dwelling-house, or in a booth or tent in a fair, or market, the owner, wife, children, or servants within, tho' not put in fear, is excluded clergy.

There must be an actual breaking, as well as a robbery. *H. P. C.* 237, 8.

By the *ft.* 3 & 4 *W. & M.* 9. a convict by verdict, or confession, of robbing a dwelling-house, any person therein and put in fear, or standing mute, not answering, or challenging above twenty, is excluded clergy.

So, by *ft.* 3 & 4 *W. & M.* 9. if he rob in a dwelling-house, any person therein, tho' not put in fear.

By the *ft.* 4 & 5 *Ph. & M.* 4. and 3 & 4 *W. & M.* 9. an accessory before to such robbery in a dwelling is excluded clergy.

By the *ft.* 39 *El.* 15. and 3 & 4 *W. & M.* 9. a convict in any case for stealing goods to the value of 5s. in a dwelling-house, shop, warehouse, or out-house thereto belonging in the day-time, or standing mute, not answering or challenging above twenty is excluded clergy.

So, if he takes goods of such a value, tho' he does not remove them out of the house; for the statute did not intend to alter the offence. *R. 16 Car. 2. Kels*, 31.

[*A.* and *B.* indicted on 39 *Eliz.* set up a ladder against window, *A.* opens it, gets in, steals; *B.* stands on the ladder in view of *A.* sees him in the chamber, assists in the robbery, has a share of the booty, but does not enter the house; *A.* has not, and *B.* has his clergy; for it must be a stealing in the house. *Foster*, 356.]

[But by 3 & 4 *W. & M.* aiders and abettors under this and under 5 & 6 *El.* 6. are ousted. *Foster*, 356.]

[Whatever kind of entry or breaking is burglary at common law, will bring a man within statute of *Ed.* 6. and 39 *Eliz. c.* 15. as to house-breaking and larceny in the day-time, and nothing short of it will. *Per Foster J.* *Foster*, 108.]

[Breaking

(Y

[Breaking chests, or even fixtures which merely supply the place of chests, not within those statutes. *Semb. Per Foster. Foster, 108.*]

By the *stat. 10 & 11 W. 3. c. 23.* a convict, &c. for stealing goods to the value of 5 s. by night or day in any shop, warehouse, coach-house, or stable feloniously, tho' no actual breaking, and tho' no person there to be put in fear, or standing mute, &c. or any accessory before, is excluded clergy.

[A common warehouse by the water-side, where merchants usually lodge goods for exportation till they have opportunity of putting them on board, is not within the *stat. 10 & 11 W. 3. c. 23.* for it must be a shop or warehouse where such goods as are stolen are usually exposed to sale. *Howard's Case, 1751, Foster, 77.*]

[If those places are *broken open* at the time of the larceny, it is not within the statute, which is for goods *privately* stolen, which excludes all force. *Semb. per Foster J. Ibid.*]

[Money is not within the act *10 & 11 W. 3. Ibid.*]

[Only goods, such as are usually lodged there. *Ibid.*]

[By *24 G. 2. c. 45.* stealing feloniously from a ship, &c. or a wharf or quay, on a navigable river, &c. is ousted of clergy.]

[But money (even *Portugal* money not current by proclamation) is not within this act. *Grime's Case, 1752, Foster, 79.*]

[Stealing cloth from the tenter in the night-time; without clergy. *22 Car. 2. c. 5. s. 3.*]

[Stealing or taking away cloth from the tenter, &c. felony and transportation for seven years for the third offence, *stat. 15 Geo. 2. c. 27.* which also enacts several regulations for the more speedy recovery of the property.]

[By *18 G. 2. c. 27.* persons stealing or hiring others to steal, linen, fustian, or cotton goods from places used for printing, whitening or drying them, are guilty of felony without clergy; or they may be transported on favourable circumstances for fourteen years.]

(Y 11.) *In horse-stealing, &c.* By the *stat. 1 Ed. 6. 12. and 2 & 3 Ed. 6. 33.* a convict by verdict, or confession, for stealing any horse, gelding, or mare, or standing mute, or not answering directly, is ousted of clergy.

[A person knowingly receiving a stolen horse, is not ousted. *Per all the Judges, P. 2 Ann. Foster, 373.*]

[By *14 G. 2. c. 6. s. 1.* whoever steals or kills with intent to steal any sheep or part of sheep or other cattle, or assists in so doing, is guilty of felony without clergy.]

[This statute takes away the benefit of clergy from those who are convicted of sheep-stealing. Outlawry is a conviction within the meaning of the act. *Rex v. Randall, H. 32 Geo. 3. 4 T. R. 521.*]

[By *s. 2. 10 l.* reward on every conviction, to those who shall apprehend and prosecute to conviction any offenders against this act, to be paid by the sheriff in a month; who, on default, is to forfeit double the sum and treble costs.]

[By *15 G. 2. c. 34.* the word *cattle* in the above act is declared to extend to bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.]

(Y 12.) *In rape, and forcible marriage.* By the *stat. 18 El. 7. 2* person

person convicted by verdict, confession, or outlawed for a rape, is excluded clergy.

And by the *st.* 3 & 4 *W. & M.* 9. if he stand mute, answer not directly, or challenge above twenty.

By the *st.* 39 *El.* 9. a convict for taking a woman contrary to the *st.* 3 *H.* 7. 2. procurers and accessories before are ousted of clergy; or if they stand mute, answer not directly, or challenge above twenty.

(Y 13.) *In buggery.*] By the *st.* 25 *H.* 8. 6. (revived by the *st.* 5 *El.* 17.) a convict by verdict, confession, or outlawed for buggery, is ousted of clergy.

And by the *st.* 3 & 4 *W. & M.* 9. if he stand mute, answer not directly, or challenge above twenty.

(Y 14.) *Where the party is indicted in a foreign county.*] By the *st.* 25 *H.* 8. 3. (revived by the *st.* 5 & 6 *Ed.* 6. 10.) and by the *st.* 3 & 4 *W. & M.* 9. a convict, standing mute, not answering directly, or challenging above twenty, on an indictment in a foreign county for felony, is excluded from clergy; if on evidence it appears, the felony was done in such manner, as would have ousted him of clergy, if the indictment had been in the county where done.

(Y 15.) *The Effect of Clergy being allowed.*

By the common law, after clergy allowed the party was delivered to the ordinary to make purgation, or without purgation. *H. P. C.* 240. 5 *Co.* 110. a.

But by the *st.* 18 *El.* 7. when he had his clergy and is burnt in the hand, according to the *st.* 4 *H.* 7. 13. he shall not be delivered to the ordinary, but be discharged; unless the judge think fit to detain him in prison, as he may, not exceeding a year.

By the *st.* 21 *Jac.* 6. for felony under the value of 10*s.* and by the *st.* 3 & 4 *W. & M.* 9. in any other case, where a man is allowed clergy, a woman shall not be hanged, but suffer burning in the hand, and imprisonment not exceeding a year, in the same manner as a man should.

By the *st.* 28 *H.* 8. 1. (continued and made perpetual by the *st.* 32 *H.* 8. 3.) persons in holy orders, who claim the benefit of clergy, shall be used as others.

By the *st.* 10 & 11 *W.* 3. 23. every person, who hath the benefit of clergy, instead of being burnt in the hand, shall be burnt with the usual mark, in the left cheek nearest the nose, before the judge in open court, who is to see it strictly executed.

[But this is repealed by *st.* 5 *Ann.* c. 6. s. 2. which enacts that any person convicted of theft or larceny shall be burnt in the hand as formerly before the making of the act of *William*, and shall, at the discretion of the court, be committed to the house of correction or work-house for not less than six months nor more than two years.]

[And by *st.* 4 *G.* 1. c. 11. and 6 *G.* 1. c. 23. persons convicted of grand or petit larceny, or any felonious stealing, and who are entitled to the benefit of clergy, may at the discretion of the court be transported for seven years to *America*; and by 19 *G.* 3. c. 74. to any other parts beyond the seas; returning, &c. without clergy.]

[By 19 *G.* 3. c. 74. offenders liable to transportation may, at the discretion



discretion of the judges, be employed, if males (except in the case of petty larceny) in hard labour for the benefit of some public navigation; or whether males or females, in all cases may be confined to hard labour in certain penitentiary houses erected by virtue of the act, but in no case for a longer term than seven years.]

[But this act has continuance only to the 1st of June 1784, and from thence to the end of the then next session of parliament; except with respect to offenders at that time under confinement, with regard to whom it shall continue to the end of their terms. And by 24 C. 3. c. 56. continued to June 1st, 1787.]

[By 27 G. 3. c. 1. the authority given by former acts to transport convicts to such place as his majesty by the advice of the privy council shall think proper, is recited, and the place for the future declared to be, *Botany Bay*.]

By the *stat. 1 Ed. 6. f. 14.* in cases, where clergy is not restrained, or where it is restrained by that act, (unless for murder, or wilful poisoning,) a peer shall be deemed as a clerk convict, tho' he cannot read, and without burning in the hand.

If a clerk was delivered to the ordinary without purgation to make purgation; till purgation made, he could not take goods to his own use. *5 Co. 110. a.*

But now, when he has clergy, and is burnt in the hand, he is capable of taking goods afterwards to his own use; for the *stat. 18 El. 7.* is tantamount to a pardon. *R. 5 Co. 110. a.*

[The benefit of clergy, or the suffering the punishment appointed by statute where it is allowed, has the effect of a pardon; for which *vide Pardon*.]

So, if the burning in the hand be pardoned. *5 Co. 110. b.*

And the king may pardon the burning in the hand as well upon an appeal as an indictment. *R. 5 Co. 50. b.*

(Y 16.) At what Time granted.

Clergy is not usually granted till an inquest taken for the felony; for that is more for the advantage of the king, and the party. *H. P. C. 239. 2 Inst. 164.*

But it may be allowed under the gallows. *H. P. C. 239, 240. Dy. 205.*

Where judgment of *peine forte & dure* is given. *H. P. C. 239.*

So, if clergy was prayed, and allowed, and *non legit* entred upon the record, it may afterwards be allowed; and if he reads, the first entry will be void. *R. Dy. 205. H. P. C. 240.*

It may be allowed in discretion, tho' he do not challenge it. *H. P. C. 239.*

It may be allowed in *B. R.* where the record is removed thither before clergy allowed by the justices of gaol delivery. *R. 1 Sal. 61.*

It may be allowed, tho' the party does not pray it, but pleads a pardon, &c. which is disallowed. *Kelg, 29.*

The judge is the person, who shall judge, when clergy shall be granted. *H. P. C. 240.*

And, when he reads; for the ordinary is only the minister. *H. P. C. 240. Kelg, 28. 51.*

And tho' the ordinary allows that he reads, the judge may say otherwise. *Kelg, 28.*

And

And if the ordinary allows it, when he does not read, he may be fined. *Kelg*, 28. 51.

### (Z) Seizure of a Felon's Goods.

**I**F a man be indicted for felony, the goods of the indicted may be seized for the king by the sheriff, &c. and inventoried, and the town shall be charged with them. 3 *Inst.* 228.

But before indictment, they cannot be seized or inventoried. 3 *Inst.* 229.

So, after indictment, they cannot be seized and carried away, before conviction, or attainder. *Ibid.*

So, before conviction or attainder, the king cannot grant those goods to another. *Ibid.*

By the *stat.* 1 R. 3. 3. if a sheriff, &c. or other, take or seize the goods of any arrested or imprisoned, before conviction, or attainder, or before the goods be otherwise lawfully forfeited, he shall forfeit double the value of the goods so taken, to the party grieved.

And this extends to money as well as other goods. *R. Ray.* 414.

So, before conviction, the felon may make a sale *bonâ fide* for a valuable consideration; for the property remains in him. *R. Skin.* 357, 358.

Yet if the felon, after seizure of his goods by the sheriff makes a sale, in trust for his son, and is afterwards convicted; the sale will be fraudulent by the common law, and void, as to the king. *R. Skin.* 358.

### (A) Restitution to the Party robbed.

**B**Y the common law, the plaintiff in an appeal of robbery shall have restitution of the goods stolen.

So, by the *stat.* 21 H. 8. 11. if a felon be indicted, and afterwards attainted by the evidence of the party robbed, or the owner of the goods, or of any other by his procurement, the party robbed or owner shall be restored to the goods or money, and the justices of gaol delivery may award writs of restitution from time to time, as in the case of an appeal.

And the owner shall have restitution, tho' his servant was robbed. *Stamf.* 167.

Tho' he does not make fresh pursuit. *Ibid.*

Tho' the goods are sold in market overt. *Kelg*, 48. *Dub. Kelg*,

35.

Or, waived, &c. *Kelg*, 49.

But he shall have restitution only for the goods mentioned in the indictment. *Ibid.*

[By *stat.* 25 G. 2. c. 36. advertising a reward for things lost or stolen 50 *l.* forfeiture each, on advertiser and printer.]

## JUSTICES OF PEACE.

## (A 1.) How constituted.

**N**ONE but the king can make justices of peace. *Vide Dalt. 1. 10.*  
(edit. 1727.)

And the king cannot grant a power to another to make them.  
20 *H. 7. 8.*

Neither can a man prescribe to have such a power. *Co. L. 114.*  
*Per Brian and Pigot, Bro. Peace, 18.*

By the *stat. 27 H. 8. 24.* no person shall have any power to make any justices of Eyre, assize, peace, or gaol-delivery, but all shall be made by letters patent in the name and authority of the king or his heirs, in all counties, and other places.

[Provided, that counties palatine, boroughs, &c. which have power to have justices, enjoy the said authority. *Vide post. (A 5.)*]

## (A 2.) By Tenure.

But by the common law, a man might have lands by tenure, to find *tot custodes pacis* in such a place. *Co. L. 106. a.*

## (A 3.) By Election.

So, by the common law, a writ went to a man to make him conservator of the peace; as 49 *H. 3. Lamb. 1. 1. c. 3.*

Or, a writ went to the sheriff to elect *in pleno comitatu unum de probiorum et potentiorum comitatus sui in custod. pacis*; and thereupon another writ to the bailiffs to summon the freeholders to elect, &c.  
2 *Iust. 174. Lamb. 1. 1. c. 3.*

And another writ to the person elected, *quod ad hoc diligenter intendat.* *Lamb. 1. 1. c. 3.*

## (A 4.) By Office.

So, by the common law, a man might be conservator of the peace by his office: as, the chancellor, treasurer, high steward, constable, and marshal, master of the rolls, and every justice of *B. R.* throughout the kingdom. *Dalt. 1.*

The justices of *C. B.* and barons of the *Exchequer* in their several courts. *Dalt. 2.*

So, justices of assize and gaol-delivery. *Dalt. 2.*

So, the steward of a turn, leet, and court of piepowders. *Dalt. 2.*

So, the steward of the marshalsea.

So, the constable of the household, within the king's house.

So, a sheriff, coroner. *Dalt. 3.*

Constable, and petit constable, within his precinct. *Ibid.*

## (A 5.) By Charter.

So, the king by charter, &c. may grant to a mayor, bailiffs, &c. to be conservators of the peace, within their city, borough, &c. *Bro. Commission, 5. Vide post, (A 6.)*

And such justices are not determinable at the will of the king.  
*Bro. Commission, 5.*



All those that have been mayors, and the three senior aldermen.  
*Quo Warr.* 10. *Vide London*, (K 6.)

And that other justices of the county *non se intromittant*, &c.  
*20 H. 7.* 6, 7. *Bro. Patent*, 111. *Crompt. J.* 8. *2 Mod. Ca.* 361.

But a grant, *quod iustic. de com.* or other minister *non se intromittant subpœna*, is void. *R.* 1 *And.* 297.

[A charter granting jurisdiction to borough magistrates over a district not within the borough does not exclude the county justices without express words. *Blankley v. Winslanley*, *B. R. E.* 29 *Geo.* 3. 3 *T. R.* 279.]

[And tho' such charter contain words of reference to former charters in which exclusive jurisdiction is given to the borough justices within the borough, and add that they shall have jurisdiction within the new district *in tam amplis modo et formâ*, &c. yet if there be in the latter charter a saving clause of the rights of the crown and of all other persons, the borough magistrates have only a concurrent jurisdiction with the county justices. *Ibid.*]

[By charter, the mayor and some of the aldermen of *London* have jurisdiction in *Southwark*; but as the charter contains no *non intromittant* clause as to the justices of the county of *Surrey*, the latter have a concurrent jurisdiction with the former. *Rex v. Sainsbury*, *M.* 32 *Geo.* 3. 4 *T. R.* 451.]

By the *st.* 27 *H.* 8. 24. justices of peace, &c. shall be made by letters patent of the king; provided, that counties palatine, boroughs, &c. which have power to have justices, enjoy the said authority. *Vide ante*, (A 1.)—*Post.* (A 6.)

(A 6.) By Commission.

By the *st.* 1 *Ed.* 3. 16. good men and lawful, no maintainers of evil, nor barretors, shall be assigned to keep the peace.

By the *st.* 18 *Ed.* 3. 2. two or three of the best reputation in the counties shall be assigned by the king's commission. 3 *T. R.* 40.

And by the *st.* 2 & 3 *Ph. & M.* 18. a commission to justices of peace in a borough, &c. shall not be superseded by a subsequent commission to justices of the county.

(A 7.) *Who may be constituted.*] Justices of peace, by the *st.* 1 *Ed.* 3. 16. ought to be good men and lawful, no maintainers of evil, nor barretors.

By the *st.* 18 *Ed.* 3. 2. of the best reputation in the counties (*meults vaillantz* most substantial).

By the *st.* 34 *Ed.* 3. 1. in every county there shall be assigned one lord, and with him three or four of the best quality (*meultz valeurs* the most worthy or valiant) in the county, with some learned in the law.

By the *st.* 12 *R.* 2. 2. the chancellor, &c. shall be sworn not to make justices of peace for gift, brocage, favour, or affection, nor any who by him himself, or other, privily or openly, sues to be in office, but the best and most lawful men, and sufficient.

By the *st.* 13 *R.* 2. 7. justices of peace shall be of the most sufficient knights, esquires, and gentlemen of the law in the county.

By the *st.* 2 *H.* 5. 5. *sess.* 2. they shall be of the most sufficient, dwelling in the county not taking in foreigners, unless lords and justices of assise.

So, *c. 4. sess. 1.* those of the *Quorum* were to be resident in the county (except lords justices of the one bench or the other, chief baron, serjeants, and king's attorney).

By the *st. 18 H. 6. 11.* none shall be a justice of peace who hath not 20*l. per annum*; and if such, in a month after notice of the commission, give not notice to the chancellor, that he may put another in his room, or act as a justice, he shall forfeit 20*l.* and be put out of the commission; except in towns corporate, or where there are not others sufficient.

[By *st. 1 M. st. 2. c. 8.* no sheriff shall execute the office of a justice of the peace, during the time that he acts as sheriff.]

[And by *5 G. 2. c. 18. s. 2.* no attorney, solicitor, or proctor shall be a justice of the peace for any county, during the time he shall continue in the practice of that business.]

[By *stat. 18 G. 2. c. 20.* no person is capable of being a justice of peace, who has not 100*l. per annum* in lands, &c. in possession, or 300*l.* in immediate reversion or remainder, and who shall not make oath of it at the quarter-sessions before he acts, on penalty of 100*l.* the proof to lie on defendant; and he must specify any lands he intends to insist on (which are not mentioned in his oath) at delivery of plea; and if they are liable to incumbrances jointly with other lands are not sufficient. If plaintiff discontinues or is nonsuited, defendant shall have treble costs. Only one penalty of 100*l.* shall be recovered for any offence prior to the action, and no subsequent action brought for any offence prior to the first action, and it must be commenced within six months after the offence.]

[This act does not extend to cities, &c. having justices; nor to peers or lords of parliament, privy-councillors, judges, justices of great sessions for *Chester* or *Wales*, or the heir apparent of a lord of parliament, or of any qualified to be knight of a shire; nor to the officers of the board of green cloth within the verge, nor the commissioners of the navy, nor under secretaries of state, nor secretary of *Chelsea* college, where they used to be justices; nor to heads of colleges in the universities, or the vice-chancellor or the mayor of *Oxford* or *Cambridge*, with respect to the counties of *Oxford*, *Berks*, and *Cambridge*.]

[By *st. 1 G. 3. c. 15.* justice who has once qualified need not sue out *dedimus potestatem* on a new commission, but shall take the oaths before the clerk of the peace, and sign a roll containing them.]

[By *stat. 7 G. 3. c. 9.* they need take them but once in one king's reign.]

[By *st. 9 G. 3. c. 30.* the commissioners of the navy may act as justices in all things relating to forgery, &c. to receive seamen's wages, &c. or to embezzling naval stores.]

(A 8.) *When their authority determines.*] The authority of justices of peace appointed by commission determines by the death or resignation of the king. *Dy. 165. Bro. Commission, 19. 21. Dalt. 11.*

[But by *1 An. st. 1. c. 8. s. 2.* no patent or grant of any office or employment shall determine by the king's death or demise, but it shall continue in force for six months after, unless in the mean time made void by the successor.]

By writ under the great seal. *Dalt. 11.*

By *superfedeas*. *Dalt.* 11.

But that only suspends their authority; for it may be revived by a *procedendo*. *Bro. Commission*, 13. 12 *Aff.* 21. (in a commission of *oyer and terminer*.) *Dalt.* 11.

But the coming of the justices in *eyre* or *B. R.* into any county, and proclamation made thereof. *Bro. Commission*, 9, 10.

By a new commission of the peace. 10 *Ed.* 4. 7. a. *Bro. Commission*, 6. 24.

Tho' such commission be only for a present turn. *Bro. Commission*, 7.

Or, to one justice only for his life. *Bro. Commission*, 11.

Or, to some in a particular town, or liberty; this determines the authority of the antient justices in that liberty, tho' there be not a clause, *quod alii justiciarii se non intromittant. per curiam, præter Choke*, 10 *Ed.* 4. 7. a. *Cont. per Fineux*, 20 *H.* 7. 8. *Bro. Commission*, 20. acc.

But if there be a clause, *itâ quod justic. de com. se non intromittant*, *Fineux acc.* 20 *H.* 7. 8.

But if the new commission is void; it does not determine the former; as, if it be granted to persons not in *rerum naturâ*. *Bro. Commission*, 6.

A commission to hear and determine felonies does not determine a commission of the peace, as to the peace. *Bro. Commission*, 8.

Nor, a commission of gaol-delivery; for they are consistent. *Bro. Commission*, 24.

By the *st.* 2 & 3 *Ph. & M.* 18. a commission to a county does not determine a commission for a city or town corporate within the same county.

And a new commission to others within a town does not determine the authority of the mayor and commonalty, who are justices of peace by grant to them and their successors, within the same town. *Bro. Commission*, 5.

By the *st.* 1 *Ed.* 6. 7. a justice of peace shall not lose his authority by being made a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of either bench, serjeant at law, or sheriff.

After a new commission, an act by a justice of peace in the former commission is valid, till notice specially given to him. *Bro. Commission*, 2.

Or, the new commission be read at the sessions, assises, or in full county, or a sessions held by force of it. *Bro. Commission*, 6. 14. 18.

For notice to one justice is not sufficient for others. *Bro. Commission*, 2.

[The power of *Chancery* extends only to putting them in, but has no right to punish them afterwards for mal-behaviour; the redress is to move *B. R.* for information, and afterwards the complainants may apply to *Chancery* to turn them out of commission. *Ex parte Reek*, *H.* 1736, 2 *Atkyns*, 2.]

[And when affidavits are made in the court of *B. R.* impeaching the conduct of magistrates, they are frequently ordered to be laid before the lord chancellor, to enable him to judge whether or not such magistrates ought to be continued in the commission of the peace. By Lord Kenyon Ch. J. *Rex v. J. Illiffe*, *T.* 31 *Geo.* 3. 4 *T. R.* 290.]



## (B 1.) The Authority of Justices of Peace.

Commissioners of the peace in the county at large, have all that authority which, by their commission, or by any statute, is given to them. *Vide Dalt.* 20, 21.

Justices within a corporation, have the authority granted by their charter, or any statute, to justices of cities, boroughs, and towns corporate.

[The crown may grant to any city to have justices of their own within themselves, and exclude the county justices from intermeddling in the ordinary business of justices of peace. *Talbot v. Hubble*, T. 14 Geo. 2. *Str.* 1154.]

[In such case the act of the county justices will be void, and not merely a breach of the franchise. *Ibid.*]

[So, where a city has an exclusive commission (as *New Sarum*) the county justices cannot act in excise matters within the city, tho' *stat.* 12 G. 2. c. 23. gives jurisdiction in them to justices residing near the place. *Ibid.*]

A justice of peace has no authority of any offence committed out of his borough, or county. *Vide Dalt.* 24.

Unless it be felony, or breach of the peace; for then he may secure the offenders.

Or, he be specially enabled by statute to do it.

But such act out of his precinct is void.

[He may commit a person for an act which is felony by the *Irish* law, in order to his being sent over there to be tried. *Rex v. Kimberley*, M. 3 Geo. 2. *Str.* 848.]

[Two justices may take a recognizance for the appearance of one charged with felony on the high seas at the sessions of admiralty, and the recognizance may be estreated into the *Exchequer*. *R. v. Muilman*, H. 6 Geo. 3. *Parker*, 241.]

A justice of peace, out of his borough or county, cannot do an act of jurisdiction of a thing within his precinct. *R. Cro. Car.* 213.

But a mere examination, if he exercise no jurisdiction, he may take, being out of his precinct. *R. Cro. Car.* 213.

As, an examination of a person robbed, upon the *st.* 27 *El. Cro. Car.* 213.

[By 9 Geo. 1. c. 7. a justice dwelling in a city or precinct that is a county of itself, within the county at large, may act in his own dwelling-house within the county at large.]

[And by 24 Geo. 2. c. 55. if any person against whom a warrant shall be issued, shall escape, go into, reside or be in any place out of the jurisdiction of the justice granting the warrant, any justice of the peace where such person shall be, on proof or oath of the hand writing of the justice granting such warrant shall indorse his name thereon, and this shall be a sufficient authority to execute the warrant within such other jurisdiction.]

The authority of a justice of peace is to be used *secundum vim, formam, & effectum statuti.*

And if a statute refers a matter to his discretion, it ought to be *sana discretio* conformable to law and reason. 4 Co. 100. a.

If a thing be referred to the next justice, others without him cannot intermeddle. *Per Canc.* 1 Sand. 263.

But others may join with him. *R. Sal.* 477.

So, if any authority is given to one justice, two or more may execute it. *Dalt.* 25.

But if given to two, one alone cannot execute it. *Dalt.* 25.

If a statute gives authority to justices of peace to make a conviction, the conviction must be exactly pursuant to the statute.

So, justices of peace are confined to offences in a statute named in their commission, or which concern the peace of the kingdom in general; but cannot proceed for an offence against a statute, which creates a new offence, not named in the commission.

[They (or the quarter sessions) have no authority in new created offences, but by express words. *Rex v. James*, *P. 19 Geo. 2. Str.* 1256.]

Or, by which no jurisdiction is given to justices of peace; as, they cannot take an indictment upon the *st. 2 & 3 Ed. 6. 4. R. 4 Mod.* 51.

So, they cannot take an indictment upon a penal statute, which does not give them jurisdiction: as, upon the *st. 1 & 2 Ph. & M.* 11. for using more looms than one, when he does not dwell in a city or borough. *R. 4 Mod.* 379.

Upon *st. 1 & 2 Ph. & M.* 7. for selling wares in a corporation being a foreigner, out of a fair, &c. *R. 5 Mod.* 149.

Nor, upon the *st. 5 El.* 14. forging a false deed. *R. Cro. El.* 87. *Per three J. Poph. Dub. Cro. El.* 601. *R. 9 Co.* 118. *b. Vide post.* (B 3.)

Nor, upon the statute of usury. *R. Sal.* 680.

So, they cannot take an indictment for an offence at common law, not named in the commission; for the general commission *de omnibus aliis transgressionibus*, &c. must be intended for other offences intrusted to their cognisance by the several statutes which created or enlarged their power: and therefore, they cannot take an indictment for perjury at the common law. *1 Sal.* 406.

Nor, for forgery. *R. 1 Sal.* 406.

But an order of justices, tho' it be not pursuant to the authority, being upon a matter within their jurisdiction will not be absolutely void, till it be avoided: and therefore, in an action upon a bond to perform it, if the defendant pleads, *no order made*, and the plaintiff shews a defective order, upon which the defendant demurs, there shall be judgment for the plaintiff. *R. Sal.* 674.

[By *stat. 16 Geo. 2. c. 18.* justices may act in relation to the poor, vagrants, high-ways, parochial taxes, levies, or rates, tho' rated or chargeable in the place: but not on an appeal.]

[By *stat. 24 Geo. 2. c. 44.* and *30 Geo. 2. c. 24.* no writ shall be sued against a justice for any thing done in execution of his office without a month's notice, and he may tender amends, and plead it in bar with other plea; or may pay money into court. Evidence shall not be given of any cause of action, but what is contained in notice.]

[No action shall be brought against a constable for any thing done in obedience to justice's warrant, unless he refuse to shew it; and if action is brought against him, without the justice, or with the justice, and the warrant is proved, jury shall find for constable, notwithstanding defect of jurisdiction in justice.]

By

By *stat. 26 Geo. 2. c. 14.* justices' clerks shall take no fees, but what shall be allowed by quarter-sessions, and ratified by judges of assize; a table of fees to be deposited with clerk of peace, and copy hung in the room where quarter-sessions are held. Clerk taking more forfeits 20*l.*

[By *stat. 26 Geo. 2. c. 27.* no act or order of two justices shall be vacated for want of *quorum unus* expressed.]

[By *stat. 27 Geo. 2. c. 20.* justices in warrant of distress shall direct when goods shall be sold, between four and eight days.]

[Officer may deduct reasonable charges, and return overplus to the owner.]

[This extends not to the acts for quakers' tythes.]

[By *stat. 7 Geo. 3. c. 21.* all acts done by two justices qualified to act in cities, liberties, &c. are good, tho' neither of them of the *quorum.*]

[By *stat. 9 Geo. 3. c. 20.* they are authorised in quarter-session, on presentment of grand jury at assize, to order shire-hall, &c. to be repaired, and a rate on the county for the sums laid out; if there is occasion for sudden repairs, not more than 30*l.* two justices may do it on view.]

[By *stat. 15 Geo. 3. c. 1.* they may administer oaths when any penalty is to be levied or distress made.]

[By *stat. 18 Geo. 3. c. 10.* justices may award costs on complaint determined by him: to be levied by distress; for want of it commitment from one month to ten days, or till money and expence of commitment paid: where penalty amounts to 5*l.* costs not exceeding one fifth to be deducted thereout.]

#### (B 2.) In High Treason, Misprision, &c.

In cases of treason, misprision, and *præmunire*, the justices of peace ought to apprehend the offenders. *Vide Justices, (K 1, &c.—L 1, &c.—N 1.) Præmunire.*

And shall take their examination. *H. P. C. 168.*

And the information upon oath of others, who know any thing material, in writing signed by them.

And commit the offenders. *H. P. C. 168.*

And take recognizances of the informers to give evidence before the council, or elsewhere when necessary. *H. P. C. 168.*

And shall make a certificate of their proceeding to some of the privy council. *Dalt. 212.* (edit. of 1727, 460.) or to *B. R.* or the gaol-delivery. *H. P. C. 168.*

And by the *stat. 5 El. 1.* justices of peace at the quarter-sessions may inquire of *præmunire* against such as by writing, teaching, or act, maintain the authority of the bishop of Rome heretofore claimed in this realm; but in forty days or the first day of the term must certify it into *B. R.* on pain of 100*l.* to every justice of peace present at such presentment.

And by the *stat. 23 El. 1.* justices of peace may inquire of treason against those who contrary to the *stat. 13 El. 2.* use, publish, or put in ure any bull, &c. from Rome, or absolve or be absolved by colour of it; or contrary to 23 *El. 1.* withdraw any in the realm from their obedience, or for that intent to the Romish religion, or move to be reconciled, or shall be reconciled to the see of Rome.



And of misprision of treason against those who contrary to 13 E. 2. conceal any bull, &c.

And of *præmunire* against those who contrary to 13 El. 2. abet the users, publishers, or receivers of such bulls; or bring into the realm, offer, or receive to use any *agnus dei*, &c.

And after such inquiry, the justices of peace ought to certify their presentments into B. R. without other precept. *H. P. C.* 168.

Justices of peace have no authority to hear and determine high treason, or misprision of treason. *H. P. C.* 168.

Nor, petit treason. *Semb. Comb.* 405.

Nor, offences in cases of *præmunire*. *H. P. C.* 168.

*Vide post.* (B 3.)

(B 3.) In Felony.

Justices of peace have authority to inquire of all felonies. *Vide Justices*, (M 1, &c.—O 1, &c.—P 1, &c.—S 1, &c.)

Tho' it be murder. *Dy.* 69. a. notwithstanding that by the *ft.* 6 Ed. 1. 9. an homicide shall be imprisoned till the coming of the justices in eyre, or gaol-delivery; and by the *ft.* 4 Ed. 3. 2. keepers of the peace shall send their indictments before the justices of gaol-delivery; for their authority has been since enlarged by the *ft.* 18 Ed. 3. 2. and 34 Ed. 3. 1. *H. P. C.* 165, 166.

Or, petit treason, as of a felony. *Co. L.* 391. a.

By the *ft.* 18 Ed. 3. c. 2. justices of peace with other learned men, when need is, shall be assigned to hear and determine and punish felonies and trespasses in the same county.

And by the *ft.* 34 Ed. 3. 1. they may hear and determine, at the king's suit, all manner of felonies and trespasses in the same county; and writs of *oyer* and *terminer* shall be granted, &c.

And by the *ft.* 17 R. 2. 10. in every commission of the peace two men of law shall be assigned, to make deliverance of thieves and felons.

But by the *ft.* 1 & 2 Ph. & M. 13. justices of peace are directed to certify the examinations of prisoners for manslaughter or felony, and the bailment of them, to the next gaol-delivery.

Justices of peace may hear and determine all felonies by statutes, which specially give authority thereof to justices of peace. *H. P. C.* 167.

And all felonies made by statutes, in which no jurisdiction is given to any justice, or court in particular, nor any special manner of trial prescribed.

But they cannot hear felonies, unless there be a clause in the commission *ad audiendum & terminandum*. *H. P. C.* 165.

Yet, by force of that clause, they cannot hear felonies limite. statute, to justices of *oyer* and *terminer*; as, forgery by the *ft.* 5 El. 14, &c. *H. P. C.* 165. *R.* 2 Rol. 96. l. 25.

And in regard of the direction above, by the *ft.* 1 & 2 Ph. & M. 13. of sending the examination of felons to the next gaol-delivery, they will not in discretion determine great felonies. *H. P. C.* 166.

They cannot proceed upon an indictment taken before the coroner. *H. P. C.* 166. 168.

Or, before justices of *oyer* and *terminer*, or gaol-delivery. *Ibid.*

But

But only upon an indictment before themselves or their predecessors.  
*H. P. C.* 166. 168.

Or, transmitted to them from the sheriff's turn; by the *st.* 1 *Ed.* 4. 2. *Ibid.*

Justices of peace have no authority to hear and determine felony against the *st.* 3 *H.* 7. 18. whereby the steward, treasurer, and comptroller of the king's household, or one of them, may inquire by twelve of the check-roll, if a sworn servant admitted into the check-roll of the household have conspired the death of the king, or a lord of the realm, or the king's council, the steward, treasurer, or comptroller of the household: and on such inquisition the offender shall be put to answer before the said steward, treasurer, and comptroller, or two of them, who may hear and try the offender, not being a peer, by other twelve of the household, and if convict, by confession or otherwise, he shall suffer as a felon. *H. P. C.* 167.

Nor, felony against the *st.* 8 *H.* 6. 12. which gives justices of the one bench or the other, jurisdiction of such felons who steal or withdraw any record out of the *Chancery*, *Exchequer*, the one bench or the other, or treasury, whereby any judgment is reversed, their procurers and abettors.

And this statute extends to those who raise a record. *H. P. C.* 167.

And by the same statute, it shall be tried by a jury, half of the men of any of the same courts, and half of other. *Vide Dalt.* 108.

Nor, felony against the *st.* 33 *H.* 6. 1. which enacts, that if a servant who embezzles his master's goods after his death, appear not in *B. R.* upon proclamation to be made by the sheriff two market days, upon a writ to him directed at the suit of the executor, it is felony: for *B. R.* must best know the default of appearance, which is to be in that court. *H. P. C.* 167.

Nor, murder, homicide, &c. committed within the king's house, which by the *st.* 33 *H.* 8. 12. shall be tried before the lord steward, and in his absence before the treasurer, and comptroller, and steward of the marshalsea, or two of them.

Nor, felony against 5 *El.* 14. for forging, after a conviction for the first offence, any deed, writing sealed, court roll, will, of intent that the estates, of freehold or inheritance or interest of any person in any lands, freehold or copyhold, may be molested or charged, or that any person may claim any estate or interest for years in lands, not copyhold, or any annuity in fee-simple, fee-tail, for life, or years, or any obligation, bill obligatory, or acquittance; or for consenting to such forgery; or using such deed, or writing, knowing it to be forged: for the determination of such felony is given to justices of *oyer and terminer* and gaol-delivery. *H. P. C.* 167.

Nor, felony, where the stroke is in one county and the death in another, or accessory in one county to a felony in another; for by the *st.* 2 & 3 *Ed.* 6. 24. the trial of it is given to justices of gaol-delivery, and *oyer and terminer*. *Ibid.*

Nor, felony against the *st.* 27 *El.* 2. if any receive, relieve, aid, &c. any Jesuit, &c. knowingly.

Every justice of peace by virtue of his commission, may direct hue and cry to be made upon a felony committed. *Vide Dalt.* 105. 169.

May apprehend the felon.

Or,

Or, make a precept to the sheriff, bailiff, constable, &c. to make search for the offender, upon a felony committed.

Or, to arrest and imprison a person suspected to be a felon. *Dalt.* 105.

By the *st.* 2 & 3 *Ph. & M.* 10. a justice of peace, before whom any shall be brought for felony or suspicion of it, shall take the examination of the prisoner, and information of such as bring him, of the fact and circumstances, and as much as is material shall put in writing within two days after.

And by the *st.* 1 & 2 *Ph. & M.* 13. so shall he do before bailment, if the felon be bailable.

When bailable, and how he shall be bailed, *vide* in *Bail*, (F 1, &c. —G 1.—K 1.)

The examination of the prisoner shall be without oath; of the witnesses, upon oath. *Per Ord. Kelg*, 2. *H. P. C.* 262.

And the son, or daughter may be examined against their mother. *Dalt.* 541.

But not a wife against her husband. *H. P. C.* 263. *Vide Dalt.* 540.

The justice shall take the information of the whole truth, tho' it tends to the acquittal of the felon.

By the *st.* 1 & 2 *Ph. & M.* 13. and 2 & 3 *Ph. & M.* 10. the justice of peace is fineable, if he certify not such examination, and information, and bail by him taken, to the next gaol-delivery.

Or, if it be petit larceny, it may be certified to the quarter-sessions.

And all recognizances and bailments taken by a justice of peace must be certified the first day of the next sessions *ante meridiem*. *Per Ord. Kelg*, 1.

By the *st.* 2 & 3 *Ph. & M.* 10. the justices of peace may bind by recognizance such as prove any thing material, to appear at the next gaol-delivery for the county, or corporation; and shall there certify such recognizance, on pain of being fined.

If any refuse to give evidence, the justice may commit him. *Vide Dalt.* 111.

If the offender, being upon bail, do not appear at the next sessions the first day, or if the prosecutor do not appear at the *Old Bailey* the first day of the sessions, their default shall be recorded, and process go thereupon. *Kelg*, 2.

If the offence be not bailable, the prisoner by *mittimus* shall be awarded to gaol.

By the *st.* 4 *Ed.* 3. 2. justices of peace shall send indictments (not determined before themselves) to the justice of gaol-delivery.

But if the party indicted does not appear before the justices of gaol-delivery, the justices of peace cannot proceed afterwards: for the indictment is not before them; and the justices of gaol-delivery cannot make process returnable before the justices of peace. *R.* 2 *Rol.* 96. l. 50.

#### (B 4.) For Preservation of the Peace.

By Restraint of those who break it.

By the *st.* *W.* 1. 3 *Ed.* 1. l. *le roy voit, que la peace de saint esglise*  
& de



*Et de la terre, soit bien gard & mainteign. en tous points, & que common droiture soit fait a tous auxibien as povers, come as riches, sans regard de nulluy.*

And by the *st.* 1 *Ed.* 3. 16. (which first ordained justices of peace) authority was only given to them to keep the peace.

And therefore, every justice by himself may, for the preservation of the peace, do all that a private man or constable may do.

May part, and restrain the assailants.

(B 5.) By Surety of the Peace, and good Behaviour.

So, justices of peace by their commission have authority to require *conjunctim aut divisim* surety of the peace and good behaviour. *Vide Forcible Entry*, (D 18, &c.)

And the justice may demand such surety by *parol*, if the party be present. *Vide Forcible Entry*, (D 18.) *Vide Dalt.* 379. 387.

Or, may by *parol* command an officer, or his servant, to arrest him being present to find surety. *Ibid.*

Or, may make a precept in writing under seal, to bring any before a justice to find surety. *Ibid.*

And such precept may be directed to an officer, or other indifferent person. *Lamb.* 1. 2. c. 2. *Dalt.* 387.

It must contain the cause. *Ibid.*

For the form, *to answer such things as shall be objected*, is new and bad. *Lamb.* 1. 2. c. 2. But a warrant was made in this form. *Per Popb.* 3 *Jac.* and *per Ellesmere Ld. Chanc.* 4 *Jac.* *Dalt.* 301. (edit. of 1727, 574.) Yet said to be bad. 2 *Inst.* 591.

It may warn the party himself before the justice, who granted it. *Per Wray*, 5 *Co.* 59.

*Williams*  
488.

[(B 5.) For what Causes the Surety of the Peace shall be granted.]

[When a person has just cause to fear, that another burn his house, or do him a corporal hurt, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person. 1 *Hawk.* 127.]

[So, according to the better opinion, if he be threatened to be imprisoned. *Id. ibid.*]

[But the peace shall not be granted to a man, merely because he is at variance or at suit with his neighbour. *Dalt.* c. 116.]

[Nor because he is afraid that the person against whom he prays it, will do harm to his servants or cattle. *Lamb.* 83.]

[Nor, for a battery or trespass that is past, or any breach of the peace that is past. *Dalt.* c. 11.]

(B 6.) *Recognizance for the peace; how discharged. By release.* If a recognizance for the peace be taken by a justice, for his discretion without complaint, the justice alone may release it.

If taken upon complaint of another, he may release it, if the release be certified to the next sessions, and recorded there.

Tho' it be to keep the peace against him and all people. *Cont.* 21 *Ed.* 4. 40. b.

And such release may be before the justice, who takes the recognizance, or another justice.

And

And shall be sent with the recognizance to the sessions; for the recognizance may be forfeited before the release, and therefore shall not be cancelled.

But the king cannot release or discharge a recognizance, before it be forfeited. *D. 21 Ed. 4. 40. b. 2 Vent. 131.*

Nor the party, after the forfeiture. *21 Ed. 4. 40. b.*

But the king after forfeiture, may release. *2 Vent. 131.*

*Vide post. (B 8.)*

(B 7.) *By death.*] A recognizance of the peace will be discharged by the death or demise of the king; for it was to keep the peace of the present king. *1 H. 7. 2. Dalt. 398.*

Or, by the death of him that required it. *Dalt. 398.*

Or, by the death of the cognisor. *Ibid.*

But if it was forfeited before, it is not discharged: and therefore, it is safe for the justice to send it to the next sessions. *Ibid.*

It is not discharged by the death of the sureties; for the executors are bound. *Ibid.*

If, after the death of the cognisor, his recognizance be estreated in the *Exchequer*, it shall be discharged upon plea. *R. Sav. 53.*

So, upon motion.

How a recognizance for the peace may be forfeited or superseded, *vide Forcible Entry, (D 26. 28.)*

(B 8.) Recognizance for good behaviour, how forfeited, &c. *vide Forcible Entry, (D 27.)*

A recognizance for good behaviour will be forfeited by any act, which is a forfeiture of a recognizance for the peace. *Vide Forcible Entry, (D 27.)*

Or, by an act, which is a reason for requiring surety for the good behaviour.

As, for being drunk. *Dalt. 415.*

So, for an escape from a constable after an arrest upon suspicion of a crime. *R. 2 Leo. 166.*

If he go in company with riotous malefactors. *Cro. El. 86.*

Or, go with weapons in an hostile manner. *Ibid.*

If he threaten another to beat him, or fight with him. *Ibid. 4 Inst. 181.*

If he take the goods of another, tho' it be not with violence. *Per Wray, Cro. El. 86.*

But it is not forfeited, if the party says to one, not an officer, or not in the execution of his office, *you are a quarrelsome fellow, or scurvy knave.* (*Vide 2 Rol. 228.*) *Dalt. 415.*

Or, to a merchant, *you are a bankrupt.* *Dalt. 415.*

Or, to a man, *you are a liar, drunkard, &c.* *R. 4 Inst. 181.* for tho' they are provocations, they do not end immediately to the breach of the peace. *R. ibidem. Dub. Cro. El. 86. Per three J. Mod. 249.*

Or, if the party commit a trespass *quare clausum fregit*, tho' it be intended *vi et armis* & *contra pacem*, where it is only in reputation of law. *R. 4 Inst. 181. Cro. El. 86.*

Or, trespass to the goods and chattels, and not to the person of a man: *4 Inst. 181.*

A recog-

A recognizance for good behaviour, as well as for the peace, may be released. *Vide Dalt.* 415.

Or, superfeded, or removed by *certiorari*. *Ibid.*

If the party refuses surety he shall be committed.

But if the party committed bring an *habeas corpus*, the return must shew for what cause the sureties were required, and in what sum, and all in certain. *R. 2 Vent.* 23.

[Estreats ought not to be made on proof by witnesses of misbehaviour out of court; but for non-appearance they ought, for the breach appears by act of court. *R. v. Coffins*, *P.* 18 *G.* 2. *Parker*, 54.]

If a recognizance for the peace, or good behaviour be broken, there shall be a *scire facias* upon it. *4 Inst.* 181.

And the party cannot be indicted for a breach before a *scire facias*. *R. 1 Rol.* 900. *l.* 10. *R. Ray.* 196.

*Vide Forcible Entry*, (D 16, &c.)

(B 9.) By Suppression of Riots, &c.

So, by the *st.* 34 *Ed.* 3. 1. justices of peace shall have power to restrain all evil doers, rioters, and other barretors, and to arrest, pursue, and punish them according to law. *Vide Forcible Entry*, (D 8, &c.)

By the *st.* 13 *H.* 4. 7. if any riot be made, the justices or two of them, with the sheriff, or under-sheriff, and *posse comitatus*, if need be, shall arrest them, and record what they find done in their presence, by which record the offenders shall be convicted as in forcible entry: but if the offenders be departed before the justices come, they shall inquire of such riot within a month, and hear and determine it. And if the truth cannot be so found, they shall certify the king and council in a month, on which certificate, being of the force of a presentment, the offenders shall be put to answer; and if they traverse it, it shall be sent into *B. R.* and if convicted they shall be punished at the discretion of the king and council. If they refuse to appear at the first precept, then shall go a *capias*, then a proclamation in the county to appear in three weeks, and on default, at the return of the proclamation they shall be convicted. And the next justice of peace, or sheriff, or judge of assize, not doing execution of this statute in case of a riot, &c. in their presence, shall as oft forfeit 100 *l.*—*Confirmed by the st.* 19 *H.* 7. 13.

By the *st.* 2 *H.* 5. 8. a writ shall go to the justices, to put the former statute in execution; but if they neglect it, a commission shall go to inquire of such riots, and of the default of the justices, and that, tho' no writ came to them. But they shall execute it at the king's charge to be allowed by the sheriff. And these statutes shall hold place in cities and boroughs, which have justices of peace.

By the *st.* 2 *H.* 5. 9. (*confirmed and made perpetual by the st.* 8 *H.* 6. 14., on complaint that felons or rioters are fled, witnessed under the seal of two justices of peace, and the sheriff, that the common fame runs of such riots, the chancellor shall send out a *capias*, and a writ of proclamation, and if not then taken, they shall be attaint.

By the *st.* 19 *H.* 7. 13. on inquiry of riots, the sheriff shall return twenty-four jurors of 20 *s.* freehold, or 26 *s.* 8 *d.* copyhold, or both; and 20 *s.* issue the first day, 40 *s.* the second day, on pain of 20 *l.* and if the riot be not found by reason of maintenance or embracery the justices



justices shall certify such maintainors or embracers, together with the riot, on pain of 20*l.* and they shall forfeit 20*l.*

[By *ſt.* 1 *G.* 2. *c.* 5. every justice, sheriff, under-sheriff, and mayor, shall, on notice or knowledge of any unlawful, riotous, and tumultuous assembly of persons, to the number of twelve or more, together with such help as he shall command, resort to the place, on which he shall, amongst the rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence, while proclamation is making, and after that shall openly, with a loud voice, make or cause to be made proclamation, in words to the effect prescribed by the act; *quod vide.*]

What is a riot, &c. and how suppressed upon view, *vide* in *Forcible Entry*, (D 8, &c. 14.)

(B 10.) *Upon inquisition.*] If the rioters are departed, an inquisition may be made within a month. *Dalt.* 299.

If other justices take the inquisition, it is sufficient. *Ibid.*

And, if it be within a calendar month. 1 *Sid.* 186.

Or, if it be after the month it is good, but the justices are fineable; for the justices by their commission may inquire. *Qu. Vide Dalt.* 299.

Or, if the jury be charged within a month, tho' they make their presentment afterwards. *Ibid.*

Justices of peace may inquire, tho' none of them be of the *quorum*. *Ibid.* R. 2 *Leo.* 184.

After inquisition taken, the justices may issue process for the party. *Dalt.* 300.

They may hear and determine, and thereupon fine and imprison. *Ibid.*

And, upon payment or surety for it, may deliver. *Ibid.*

But such inquisition is traversable. *Ibid.*

And if it be traversed, it shall be sent to *B. R.* or the quarter-sessions. *Ibid.*

Whether it may be taken, except at the quarter-sessions. *Dub.* 1 *Sid.* 186.

The sheriff need not join in taking the inquisition. *Dalt.* 300.

A certificate to the council of *B. R.* ought to be made, if upon the inquisition, the riot, by maintenancy of embracery, be concealed. *Dalt.* 301.

If the jury find ten guilty, the justices may certify twenty to be rioters. *Dalt.* 302.

And the certificate may supply any thing material omitted in the inquisition. *Ibid.*

But if any justice dies within a month after inquiry, the certificate cannot be made. *Ibid.*

By the *ſt.* 5 *R.* 2. 7. 15 *R.* 2. 2. and 8 *H.* 6. 9. justices of peace may give redress upon a forcible entry or detainer. *Vide Forcible Entry*, (A 1, &c.—B 1, 2.—D 1, &c.)

#### (B 11.) By Punishment of Trespasses.

By the *ſt.* 18 *Ed.* 3. 2. and 34 *Ed.* 3. 1. justices of peace may hear and determine at the king's suit all manner of trespasses in the same county.

[By *ſt.* 15 *G.* 2. *c.* 33. *ſt.* 6. any person taking the rush or shrub called

called starr or bent, on the North-West coast of *England*, convicted before one justice, forfeits 20 s. and for the second offence to suffer a year's imprisonment, whipping and hard labour.]

[§. 7. Any person having it, within five miles of such places, shall be deemed the puller of it, and forfeit 20 s.]

(B 12.) By Seizure of Arms, &c.

The statutes which concern arms are *pro bono pacis*.

By the *§. North. 2 Ed. 3. 3.* none, except the king's servants in his presence, his ministers in executing office, or assistants, or on hue and cry, shall come before the king's justices or ministers during their office with force, nor bring force in an affray of the peace, nor go or ride armed, &c. on pain to forfeit their armour, and their bodies to prison at the king's pleasure. *Conf.* by the *§. 7 R. 2. 13.* and 20 *R. 8. 1.*

The justice may command the offenders upon view, or complaint, to find surety for the peace.

Or, shall go to the place where the force is, and make a record of it, and afterwards may commit the offenders, and seize and appraise the arms found with them, and the record shall be estreated in the *Exchequer*, that the king be answered for the arms, or the value. *Dalt. 130.*

If the force be in a house, he may enter and search there. *Ibid.*

The justice may fine the offenders committed, and the record of it shall be certified to the next general sessions, as in forcible entry. *Ibid.*

Or, in *B. R.* or the justices of gaol-delivery. *Ibid.*

Or, upon payment of the fine or surety for it, the justice may deliver them. *Ibid.*

So, there may be an information against any one for going or riding in arms to the terror of people. 3 *Mod. 117.*

Upon such force there may be a writ upon the *§. North.* directed to the sheriff or the justice, commanding him that he make proclamation *ne quis armatus contra pacem & statutum accedat*, &c. And all offenders after proclamation commit to prison, and cause their arms to be seized and appraised. *F. N. B. 249. F.*

After proclamation the justice may enter himself, or by inquisition, make search for arms. *Dalt. 129.*

But if the offenders upon proclamation depart, he cannot commit them, or seize their arms. *Ibid.*

The justice must pursue the writ and make return of it. *Ibid.*

(B 13.) For Restraint of Offences against Religion.

Witchcraft.

Justices of peace have consuance of several offences against religion, to the common annoyance of the country, to the prejudice of trade, or deceit of the people. *Vide Justices, (S 13.)*

By their commission justices of peace may inquire *de veneficiis, incantationibus, sortilegiis, arte magica.*

By the *§. 1 Jac. 12.* (repealed by the *§. 9 G. 2. 5.*) if any shall take upon him by witchcraft, incantment, charm, or sorcery, to tell where treasure may be found in the earth, or lost goods found; or to the

the intent to provoke to unlawful love, or whereby cattle or goods shall be destroyed or impaired, or to hurt any person in his body, tho' the same be not effected, he shall for the first offence be imprisoned for a year, without bail, and once a quarter stand six hours in the pillory in a market town on a market or fair day, and there openly confess his offence.—And the second offence is felony. *Vide Justices, (S 13.)*

(B 14.) Popery.

(B 14.) *Mass.*] So, justices of peace have jurisdiction by the *st. 23 El. 1.* to inquire (within a year and a day after committing) of any offence against *1 El. 1. 5 El. 1. 13 El. 2. and 23 El. 1.* touching her majesty's government in causes ecclesiastical, or other matters touching the service of God, coming to church, or establishment of true religion.

By the *st. 1 El. 2.* all ministers shall use the book of common prayer; and if any manner of parson, vicar, or other whatsoever minister refuse so to do, or use any other right, ceremony, &c. he shall forfeit one year's profit of his spiritual benefices, and be imprisoned for six months; and if any person speak in derogation of the book of common prayer, or procure any parson, vicar, or other minister to sing or say any common or open prayer, or to administer the sacrament, otherwise than as in the book of common prayer, he shall forfeit one hundred marks, which if he do not pay within six weeks after conviction, he shall instead of the said sum suffer imprisonment for six months.

By the *st. 23 El. 1.* he who says mass forfeits two hundred marks and a year's imprisonment; he who hears it one hundred marks and like imprisonment. But by the *st. 29 Ed. 6.* the conviction shall be in *B. R.* or the assizes, and not elsewhere.

By the *st. 11 & 12 W. 3. 4.* if popish bishop, priest, &c. say mass, or exercise any part of his function, or any papist teach school, educate, or board youth, he shall suffer perpetual imprisonment. Repealed by *st. 18 G. 3. c. 60.* [*Vide post. (B 18.)*]

Every one who chants mass, tho' not a parson, will be within the *st. 1 El. 2. R. Dy. 203.*

If upon the *st. 1 El. 2.* there be judgment, that he forfeit 100 marks, and if he does not pay it within six weeks *quod imprisonetur*, and the fine is estreated, and he afterwards dies within the six weeks, the fine shall be levied against the executor. *Dub. Dy. 203. 231. b. But Dy. 231. b. in marg. semb. acc.*

As to contempt of the sacrament, common prayer, or any religious service, *vide Sacraments (E—F).*—*Temps, (B 3.)*

(B 15.) *Other superstition.*] By the *st. 3 & 4 Ed. 6. 10.* any, having missals, &c. or books or images, &c. heretofore used in churches, shall deface, or deliver them to the mayor, &c. or churchwarden, to be in three months delivered to the ordinary to be destroyed, on pain of 10*s.* for every book, for the first offence, 4*l.* for the second, imprisonment at the king's will for the third. And the mayor, &c. not delivering, &c. forfeits 40*l.* and the bishop not destroying, 40*l.* which offences justices of peace may determine.

By the *st. 3 Jac. 5.* none shall import, print, sell, or buy any popish



popish books on pain of 40*s.* *per* book, a third part to the king, a third to the poor, and a third to the informer; and two justices of the peace, or the mayor, &c. where the liberty is, may search houses or lodgings of a popish recusant convict, or whose wife is such, for popish books and relicts, and may deface or burn them; but if valuable, they shall be defaced at the quarter sessions, and returned to the owner.

## (B 16.) Conventicle.

By the *st.* 35 *El.* 1. (declared to be in force by the *st.* 16 *Car.* 2. 4.) if a subject, above sixteen, who hath without cause absented a month from divine service, persuade any to be present at a conventicle, &c. or be present, &c. he shall be imprisoned without bail, till he conform and make submission pursuant to that act; and if he conform not in three months, on the request of a justice of peace, &c. shall at the assizes or quarter sessions abjure, which abjuration the justice of peace shall record, and certify to the assizes.

By the *st.* 22 *Car.* 2. 1. if a subject, of the age of sixteen, or upwards, be present at a conventicle, &c. where five or more besides the household are assembled, any justice of peace or chief magistrate of a corporation on confession, oath of two witnesses, or notoriety of the fact, may record the offence and impose 5*s.* on every offender, and certify the record, which is a full conviction, to the quarter sessions, and may set 10*s.* for the second offence, to be levied by distress and sale, &c. and if a *feme-covert*, on the goods of her husband; if poor, on the goods of any present, so that no one pay above 10*l.* one-third to the king, which shall be delivered by the justice of peace into the quarter sessions, and there to the sheriff, and a memorial of payment recorded, and certified into the *Exchequer*; a third to the poor; and a third to the informer and to such as the justice thinks active in the discovery.

Provided any charged above 10*s.* may appeal in writing to the quarter sessions, and give a recognizance to prosecute with effect, where the justice shall certify such conviction, and the evidence on which it past, and the recognizance; and the appellant, if determined against him, shall pay treble costs.

He who preaches in a conventicle, &c. or suffers it in his house, forfeits 20*l.* to be levied by distress and sale, &c. or if unknown, fled, or insolvent, on the goods of any present, so that none pay above 10*l.* And the justice of peace, &c. on denial of entry, may break the house, &c. provided every offence be prosecuted within three months.

But by the *st.* 1 *W. & M.* 18. the *st.* 35 *El.* or 22 *Car.* 2. shall not extend to any present at, or preacher in any congregation, &c. with doors open, certified to the bishop of the diocese, archdeacon, or quarter sessions, and registred in their courts, who shall take the oaths of allegiance and supremacy, or declaration of fidelity, and subscribe the declaration in the *st.* 30 *Car.* 2. And if the preacher approve and subscribe the thirty-nine articles, except 34th, 35th, 36th, and part of the 20th and 27th, at the quarter sessions.

Yet he will be liable to the former statutes, unless he be qualified as the statute requires. *R. Sal.* 572.

[By the 18th section of this act disturbers of places of worship shall, upon conviction, pay a penalty of 20*l.*]

[Upon conviction of several defendants of such offence, each is liable to the whole penalty. *Rex v. Hube*, *H.* 34 *Geo.* 3. 5 *T.R.* 542.]

And a licence in one county does not give a liberty in another. *Sal.* 572. *Mod. Ca.* 228. But this is altered by the *st.* 10 *Ann.* *Sal.* 572.

An action *qui tam*, &c. lies against a justice of peace, if he refuse to examine upon complaint; tho' he is not bound to convict. *Skin.* 60.

(B 17.) Recusant convict.

By the *st.* 35 *El.* 2. and 3 *Jac.* 5. a popish recusant convict for not repairing to church, shall in forty days repair to the dwelling of himself, or parents, or birth, (unless stayed by order of the king or six of the privy council, sickness, or imprisonment, or be out of the realm, and then in twenty days after the impediment removed,) and not remove above five miles thence, without licence in writing from the king, three of the privy council, or four justices of the peace with the assent of the bishop, lieutenant, or deputy lieutenant, or obliged by process, &c. on pain of losing all his goods, and freehold lands to the king, and copyhold to the lord of the manor, unless recusant, and then to the king, during life, but shall certify his name to the minister or constable, and he to the quarter sessions.

By the *st.* 3 *Jac.* 5. if any popish recusant convict come into court where the king or his heir apparent is, he forfeits 100*l.* a moiety to the king, a moiety to the prosecutor.

He shall in ten days after conviction depart from *London* and ten miles distance, unless he be a tradesman, or have a constant dwelling there, on like pain of 100*l.* moiety, &c.

He shall not practice common or civil law, as a counsellor, attorney, solicitor, advocate, proctor; nor physick; or be an apothecary, judge, steward, register, town-clerk, or officer of any court; or be officer in any troop, ship, or fort, on like pain of 100*l.*

A popish recusant convict, or if his wife be convict, unless he, his children and servants hear divine service, and being of meet age receive the sacrament, &c. shall be disabled to exercise any office or charge in the commonwealth by himself, or deputy.

A popish recusant convict shall not be executor, administrator, or guardian in *chivalry*, fofage, or nurture: nor, by the *st.* 12 *Car.* 2. 24. guardian by devise.

He shall be as excommunicate and disabled to sue any action, but for lands not seized for recusancy.

If married otherwise than according to the law of the realm, the man shall be disabled from being tenant by the curtesy, or if his wife have no estate of which he can be so, shall forfeit 100*l.* the woman shall lose her dower, jointure, frankbank, and customary share of her husband's goods: if he cause his child to be baptized otherwise, he forfeits 100*l.* one-third to the king, a third to the poor, a third to the informer: if buried otherwise, his executor or administrator forfeits 20*l.* to the king, poor, and informer.

By

By the *st.* 23 *El.* 1. 29 *El.* 6. and 3 *Jac.* 4. a popish recusant convict forfeits 20 *l.* per month, or two parts of his lands and tenements whereof he is seised, or settled to his use or in trust for him, or wherewith he or his family is relieved, at the election of the king.

By the *st.* 3 *Jac.* 5. a *fine-covert* being a popish recusant convict, if her husband be not, forfeits two parts of her jointure, and dower, and cannot be executrix or administratrix to her husband, or demand any portion of his goods.

By the *st.* 1 *Jac.* 4. and 3 *Jac.* 5. a person who sends any child to a seminary, &c. or to have his education beyond sea, without licence from the king or six privy council, (not being a merchant, factor, &c.) forfeits 100 *l.* And by the *st.* 3 *Car.* 2. if he send a child, &c. or relief to such child, or benevolence, &c. to any religious house, he shall be disabled to sue or be committee of a ward, executor, or administrator, or to take a legacy, or gift, or bear any office, and shall lose all his goods, and all his lands, annuities, &c. during life.

And the person sent shall be disabled to enjoy or take by descent, devise, &c. any lands, goods, &c. or be executor, &c. unless he take the oaths and receive the sacrament, &c. but they shall go to the next heir, not recusant, until conformity, who shall then account for the profits, &c.

By the *st.* 3 *Jac.* 5. and 1 *W. & M.* 26. a popish recusant convict, and he refusing to repeat and subscribe the declaration in the *stat.* 30 *Car.* 2. when tendered by two justices of peace, or to appear on notice by warrant under the hands and seals of two justices left at his abode, whereupon his name shall be certified and recorded at the quarter sessions, shall be disabled to present to any benefice, free-school, hospital, &c. or any in trust for him, or to grant the next avoidance, until at quarter sessions he subscribe the declaration and take the oaths, &c. but such presentation, &c. shall be given to the two universities of *Oxford* and *Cambridge* respectively.

But if the convict be pardoned, he shall be restored to his ability. *R. per three J. 3 Lev.* 333

If after conviction the king takes the advowson as part of his two parts, he shall present, not the university. *Per three J. Jon.* 27.

By the *st.* 11 & 12 *W.* 3. 4. any educated in popery, who after eighteen years of age doth not in six months take the oaths, &c. and subscribe the declaration 30 *Car.* 2. shall be disabled to take by descent, devise, or limitation, any lands, &c. for himself only, but his next of kin, being protestant, shall take the profits during his life, or till he take the oaths and subscribe the declaration, &c. without account. And no papist shall be able to purchase in his own, or any other's name. Repealed by *st.* 18 *G.* 3. c. 6c. *Vide post.* (B 18.)

By the *st.* 3 *Jac.* 5. the armour, &c. of a popish recusant convict shall be seized by warrant of four justices of peace at the quarter sessions, (except such as the justices think necessary for security of his house or person,) and kept at his costs where the justices think fit: and if any refuse to shew his armour, &c. or disturb the delivery, he shall forfeit the armour, &c. and suffer three months' imprisonment, without bail.

And by the *st.* 1 *W. & M.* 15. a papist refusing the oaths and declaration, 30 *Car.* 2. or to appear on notice left at his abode by war-



rant from two justices of peace, if he keep any arms, &c. more than allowed by order of quarter sessions for defence, two justices may authorize any in the day-time with a constable to search for and seize them, and deliver them at the quarter sessions; and may commit for three months without bail a papist not discovering arms, or hindering the search or seizure, who shall forfeit the arms, &c. and treble value as appraised at quarter sessions.

And a concealer of arms shall be committed three months without bail, and forfeit treble value; and a discoverer of the concealment shall have the value of the arms, &c. to be assessed by the justices at sessions, and levied by distress and sale, &c.

And no papist so refusing, &c. shall keep an horse above the value of 5*l.* which two justices of peace by warrant, &c. may seize, and commit the concealer for three months without bail, who forfeits treble value.

By the *st.* 1 *W. & M.* 8. if a person on the second refusal of oaths be bound over to the assizes and there refuse them, and likewise refuse to make and subscribe the declaration 30 *Car.* 2. he shall be taken as a popish recusant convict.

By the *st.* 1 *W. & M.* 9. any justice of peace shall cause a reputed papist, not being a foreigner, in *London* or ten miles compass, to be brought before him and tender the declaration 30 *Car.* 2. who refusing and yet continuing in *London* or *Westminster*, or ten miles distance, unless a tradesman, or hath constant dwelling there, and certifies his name at the sessions, shall forfeit as a popish recusant convict: so shall refusers, whose names the justices shall certify into *B. R.* or the next quarter sessions, if they do not take and subscribe the declaration next term or quarter sessions.

(B 18.) *Prosecution for recusancy.*] By the *st.* 27 *El.* 2. if any person, knowing a jesuit, &c. in *England*, discover it not in twelve days to a justice of peace, &c. he shall be fined and imprisoned at the king's pleasure: and the justice of peace, not discovering it in twenty-eight days, to some of the privy council, forfeits 200 marks.

By the *st.* 35 *El.* 2. a jesuit, &c. examined and refusing to answer, whether he be so or not, shall be committed until he directly answer.

By the *st.* 3 *Jac.* 4. churchwardens and constables, once a-year, shall present the monthly absence of a popish recusant, and the names of children nine years old, and servants, at quarter sessions, on pain of 20*s.* and for every conviction on such presentment shall have 40*s.*

If presented, and on proclamation he renders not himself to the sheriff before next quarter sessions, he shall be convict, &c.

But a presentment for absence the first *M.* and so for six months, where there are only ten days after first *M.* before the sessions, is bad. *R. Ray.* 434.

By the *st.* 11 & 12 *W.* 3. 4. any apprehending a jesuit, &c. so that he be convict of exercising his function, shall have 100*l.* from the sheriff, who shall pay it in four months on certificate, and on pain of 200*l.*

By the *st.* 3 *Jac.* 5. any discovering a recusant, or a retainer of a jesuit, &c. to a justice of peace in three days after the offence, shall be pardoned himself, and have a third part of the forfeiture, if

if it exceed not 150 *l.* and then 50 *l.* provided he be taken and convicted.

By the *fl.* 29 *El.* 6. indictment of a recusant shall be good, tho' the party is not said to be within the realm.

By the *fl.* 3 *Jac.* 4. it shall not be reversed for defect or want of form, unless the party conform. *Ray.* 434.

So, by the *fl.* 22 *Car.* 21. indictment for being or preaching at a conventicle, &c. or any proceeding on that act, shall not be impeached for default of form.

And if he conform, the conviction upon the *fl.* 3 *Jac.* 4. shall not be reversed by writ of error, but shall be quashed in the *Exchequer*. *Ray.* 434.

[By *stat.* 18 *Geo.* 3. c. 60. the *stat.* 11 & 12 *W.* 3. 4. as far as it relates to apprehending, taking, or prosecuting popish bishops, priests, or jesuits; or subjects them, or papists, educating youth, to perpetual imprisonment; or disables papists to inherit, &c. and gives to the next of kin; or disables them to purchase manors, lands, &c. or makes void all profits, &c. out of lands for their behoof, is repealed, as to all who shall take the oath there prescribed of allegiance to king *George*, abjuring the Pretender, rejecting the positions that hereticks may be murdered, or that no faith is to be kept with them, that princes excommunicated, &c. may be deposed or murdered by any person, and declaring that the pope, &c. have no temporal or civil jurisdiction in this realm.]

#### (B 19.) Recusant conforming.

Upon conformity, the recusant shall make the submission prescribed by the *fl.* 35 *El.* 2.

By the *fl.* 3 *Jac.* 4. a popish recusant conforming, shall in a year after receive the sacrament, &c. on pain of 20 *l.* and so once every year, on pain of 40 *l.* for the second year, and 60 *l.* every subsequent year, a moiety to the king, a moiety to the informer, to be recovered at *Westminster*, assizes, or quarter sessions.

And an information upon this statute is sufficient, tho' the time or court, where the conviction was had, does not appear, if there be no demurrer to it. *R. after Verdict*, 2 *Cr.* 365.

Or, when, and before whom he conformed. *R.* 2 *Cr.* 366.

But by a conformity declared in court before the trial, the action of debt commenced shall be discharged; for the prosecutor sues subject to that hazard. *R. Raym.* 465.

#### (B 20.) Non-Conformist.

By the *fl.* 13 & 14 *Car.* 2. 4. and 15 *Car.* 2. 6. on certificate from the bishop, that any person disabled or prohibited to preach, &c. (by reason of non-conformity,) hath preached any sermon, &c. two justices of peace or mayor, &c. may commit, &c. for three months without bail.

By the *fl.* 17 *Car.* 2. 2. persons not declaring assent to the common prayer, &c. shall not come within five miles of a corporation, &c. nor teach school, &c. on pain of 40 *l.* one third part to the king, a third to the poor, and a third to the prosecutor at *Westminster*, assizes, or quarter sessions.

But by the *st.* 1 *W. & M.* 18. a person, qualified by that act to preach, shall not be subject to the penalties of the said statutes.

(B 21.) Quaker.

By the *st.* 13 & 14 *Car.* 2. 1. a quaker refusing the oath, when duly tendred, or maintaining all oaths unlawful, or assembling for religion, &c. forfeits not exceeding 5*l.* to be levied by distress and sale, &c. and for want of distress and non-payment in a week, to be committed to gaol or house of correction; for the second offence not exceeding 10*l.* to the use of the house of correction, to be levied, &c. on conviction by verdict, confession, or notoriety of the fact at the quarter sessions, &c. for the third offence shall abjure, or be transported.

But by the *st.* 1 *W. & M.* 18. a person subscribing the declaration 30 *Car.* 2. and taking the declaration of fidelity, and profession of the christian belief there prescribed, is exempted from the penalty of the said statute *supra*. Provided he produce two witnesses to swear they believe him a protestant dissenter, or a certificate under the hands of four conformists and six of his congregation, owning him, &c. and the justice of peace shall require a recognizance with two sureties of 50*l.* and for failure commit him till produced.

(B 22.) Profanation,

As to penalties and offences in the neglect or profanation of the sacraments, or divine service, *vide Sacraments* (E—F).

As to offences by profanation of the sabbath, *vide Temps*, (B 3.)

(B 23.) *Cursing and swearing.*] By the *st.* 21 *Jac.* 20. (continued by the *st.* 3 *Car.* 4. and 16 *Car.* 4.) and by the *st.* 6 & 7 *W.* 3. 11. if any be convict of prophane cursing or swearing, by confession, oath of one witness, or hearing of justice of peace, before any justice of the county or corporation, he shall forfeit, if a servant, day-labourer, common soldier, or seaman, 1*s.* other person, 2*s.* to the use of the poor where the offence was, for the first offence; double for the second offence; and treble for the third offence; on neglect of payment to be levied by warrant from a justice of peace to a constable, &c. by distress and sale, &c. and in default of distress, the person, if above sixteen, to be on warrant, &c. set in the stocks an hour for a single offence, and for more, two hours; if under sixteen and he pay not, to be whipt by the constable or parent, &c. in presence of the constable. But the offence shall be prosecuted within ten days, and the justices of peace shall certify the conviction to the next quarter sessions.

By the *st.* 6 & 7 *W.* 3. 11. a justice of peace, &c. omitting his duty, forfeits 5*l.* a moiety to the informer.

If the party is charged by the information to be a gentleman and above sixteen years of age, it is not necessary that it appear by the adjudication, or the oath upon which the conviction is, that he was so, and not a labourer, soldier, or sailor. *R. 2 Mod. Ca.* 366.

[If the information sets forth that the defendant is a gentleman, &c. and the oath is, that the *aforesaid* defendant did swear, it is good, tho' the oath is not that he is a gentleman, &c. *Rex v. Tucke*, *P. 11 Geo.* 2. *Ld. Raym.* 1386.]

[If



[If the penalty is laid at 2*s.* it must appear that the offender is not a servant.]

But the conviction ought to shew the oath, for which he was convicted. 2 *Mod. Ca.* 367, 58, 9. *Str.* 497. 686. 2 *Ld. Raym.* 1360.

[By the *st.* 19 *Geo.* 2. 24. the penalty is for a day-labourer, &c. 1*s.* for every other person under a gentleman, 2*s.* for every person of or above the degree of a gentleman, 5*s.* *Vide the st.*]

And by *st.* 22 *Geo.* 2. c. 33. persons belonging to his majesty's ships of war, guilty of profane oaths or curses, shall incur such punishment as a court martial shall impose.

[A conviction under the first of these acts, shall not be removed by *certiorari.* *f.* 8. But an information will lie against a magistrate for convicting under it, without hearing the defendant's witnesses, if from the circumstances it appear that the magistrate acted from corrupt motives. *Baily v. Newman*, *T.* 16 *Geo.* 3.]

[Conviction for swearing one hundred oaths, viz. by G—d, and a hundred curses, viz. G—d d—mn you, is good, without repeating them a hundred times. *Kex v. Roberts*, *M.* 11 *G.* 2. *Ld. Raym.* 1376. *Str.* 608.]

(B 24.) For restraint of Offences to the common Annoyance, &c.

#### Refusal of Oaths.

By the *st.* 3 *Jac.* 4. 7 *Jac.* 6. 1 *W. & M.* 8. and 7 & 8 *W.* 3. 27. justices of peace have authority to make a tender of the oaths of allegiance and supremacy, and to make convictions against those who refuse. *Vide Allegiance*, (B 2, &c.) *Vide ante*, (B 17.)

Two justices of peace may issue a warrant upon the *st.* 7 *Jac.* 6. to bring the person suspected before them, to take the oath; for when a statute enables them to tender an oath, it gives a power also for warning the party before them. *R.* 12 *Co.* 130.

But a constable cannot break an house to take such a person. *R.* 12 *Co.* 131.

And the nobility may be committed for refusal of the oath; for the words extend to all before, among whom are the nobility. *Ibid.*

#### (B 25.) Inns, and Alchouses.

Every one may erect a common inn, if it be not *ad nocumentum*. *H. P. C.* 146. *Hut.* 92. 2 *Rel.* 84. *l.* 25.

So, by the common law, keeping an alchouse without a licence was no offence. *Per Cur.* 1 *Sand.* 249. *Sho.* 398. 2 *Hut.* 99. *D.* 1 *Sal.* 45.

Nor, selling wine without a licence. *Per Cur.* 1 *Sid.* 6.

So, a man who has an ancient inn may enlarge the rooms or build new edifices within the circuit of the inn, and they shall have the same privileges with the first edifice. *R.* 2 *Rel.* 84. *l.* 55.

But erecting a common inn, where there were ancient inns enough before, is a nuisance. *H. P. C.* 146. 2 *Rel.* 345.

Or, when situated in an inconvenient place. *Ibid.* *R.* *Hut.* 100.

Or, when disorders are suffered there. *H. P. C.* 146. 2 *Rel.* 345. *Salk.* 45.

Or, if a common innholder refuse to entertain guests, he may be indicted and fined. *H. P. C.* 146.

So, if a common innholder be convicted upon an indictment for bad behaviour, he may be suppressed. *R. Hut.* 100.

(B 26.) *Ought to have licences.*] By the *st.* 5 & 6 *Ed.* 6. 25. none shall keep an alehouse, unless allowed in open sessions or by two justices of the peace, (1 *Qu.*) who shall take a recognizance against unlawful games and for good rule, and on pain of 3*l.* 6*s.* 8*d.* certify it to the next quarter sessions; the breaches whereof the quarter sessions may inquire of, &c. And if any sell ale, &c. without a licence, &c. unless in the time of a fair, for every offence two justices (2*Qu.* 1.) shall commit him to gaol, without bail, for three days; and before his deliverance shall take a recognizance with two sureties not to use selling of ale, as the justices see convenient; which recognizance and offence the justices of peace shall certify to the next quarter sessions, where in open sessions he shall be fined 20*s.* for every offence.

By the *st.* 3 *Car.* 3. if any use the common selling of cyder, ale, &c. without a licence, on conviction by view, confession, or two witnesses, he shall forfeit for the first offence 20*s.* to be levied by distress, on a warrant of one justice of peace to the constable or churchwarden, for the use of the poor; and for non-payment in three days, by sale, &c. or if no distress and no payment be in six days, shall be committed to the constable, &c. to be openly whipt, as the justice shall appoint: for the second offence shall be committed to the house of correction for a month, to be dealt with as an idle person: for the third offence shall be committed, till delivered by the justice at the general sessions. And such justice may commit a constable, &c. refusing or neglecting to execute the warrant, &c. till he cause it to be executed, or pay 40*s.* to the use of the poor.

Any one convicted by two justices, according to the *st.* 5 & 6 *Ed.* 6. 25. for selling ale without licence, cannot be afterwards allowed, but in open sessions. *H. P. C.* 147. *Per Warb. A.* 1613, *Dalt.* 26, 27. (Edit. 1727. 31.)

By the *st.* 5 & 6 *Ed.* 6. 25. justices of peace, or two of them (1 *Qu.*) may put away common alehouses, where they think meet.

But this clause seems to be intended of alehouses *in esse* at the time of the statute; but others extend it to alehouses afterwards; and for these they take the words of *Warb.* and *Hale, supra*, that if they are suppressed by two justices they cannot be allowed afterwards, but in sessions.

Inns erected since the *st.* 5 & 6 *Ed.* 6. 25. must have licences, &c. as alehouses. *R. cent. Hut.* 100. *cont.* except where it degenerates to an alehouse. *Sal.* 45.

By the *st.* 4 *Jac.* 4. none shall directly or indirectly sell any beer or ale to a common alehouse-keeper, not then licensed, &c. other than for the expence of his household only on pain of 6*s.* 8*d.* *per* barrel, whereof the sessions or court of record of a corporation, &c. may inquire, &c. by action, indictment, &c. a moiety to the prosecutor, a moiety to the poor, which the officers levying, &c. shall deliver to the churchwardens, and they to the poor, on pain of forfeiting double, to be levied and employed as aforesaid.

By

By the *st. 2 Geo. 2. 28.* a licence, not at a general meeting, shall be void.

If a recognizance given by an alehouse-keeper be broke, it may be proceeded upon. *Sal. 45.*

If an alehouse be kept without licence, it may be suppressed. *Sal. 45.*

Or, if they commit disorders which amount to a nuisance; it may be indicted. *Sal. 45.*

Or, suppressed. *Semb. Sal. 471.*

The order for suppression need not shew that it was a common alehouse, or that the party was summoned. *2 Mod. Ca. 309. 377. Rex v. Venables, T. 11 Geo. Fort. 325. Stra. 630. 2 Ld. Raym. 1405.*

[But if it afterwards appear by affidavit that the justices committed the offender without summoning him, they will grant an information against them. *Ibid. Rex v. Allington, H. 12 Geo. Str. 678.*]

[But if the offender appears, and is present at the conviction without offering at a defence, it is sufficient *Rex v. Athay, M. 32 Geo. 2. 2 B. M. 653.*]

[In conviction on *3 Car. c. 3.* it is not necessary to say that he had not been punished by *5 & 6 Ed. 6. c. 25. Rex v. Ford, T. 9 Geo. Str. 555.*]

But a man cannot be indicted merely for keeping an alehouse without licence; for the statute has prescribed another manner of restraint. *Sal. 45.*

So, the sessions cannot suppress an alehouse, which has a licence by two justices, except for disorder. *R. Sal. 471.*

[So, the order must shew in what county the alehouse was; for the county in the margin relates to the place of making the order. *R. 2 Mod. Ca. 310. Rex v. Austin, M. 11 Geo. Fort. 325.*]

[*B. R.* has no power to review the reasons on which justices form their judgment in granting licences, by way of appeal from their judgments, or over-ruling that discretion intrusted to them. *Rex v. Young, P. 31 Geo. 2. 1 B. M. 556. Rex v. Williams, Rex v. Davies, Rex v. Baylis, P. 2 Geo. 3. 3 B. M. 1317.*]

[But if it clearly appears that they have been partially, or maliciously, or corruptly influenced in the exercise of this discretion, they are liable to indictment or information; or possibly to action, for gross and injurious malice. *Ibid.*]

[The only method of bringing this before the court is on the footing of criminality; insomuch that when a rule to shew cause why an information, &c. had been moved for, and the court out of tenderness to the justices had made it, to shew cause why they had not granted the licence, they were obliged to alter it again before it could come on to be argued regularly. *Ibid.*]

[Having kept a public-house without licence; having been convicted of selling spirits without licence; suffering a labourer to drink a whole day in harvest, and vindicating it; being charged with a fraud on oath; highwaymen using his house as a public house; that there are public houses sufficient; are good reasons to refuse a licence. *Ibid.*]

[Action lies not against justices for refusing a licence. *Basset v. Godseball, T. 10 Geo. 3. 3 Wilf. 121.*]

[In order to obtain information, the party applying must allege he



he is not guilty of the offence. *Rex v. Athay, M. 32 Geo. 2. 2 B. M. 653.*

[Justices have no authority to annex conditions to the grant of licences. *Ibid.*]

[If justices refuse licence for having voted, or acted, contrary to their recommendation for members of parliament, *B. R.* will grant information. *Rex v. Williams, Rex v. Davis, P. 2 Geo. 3. 3 B. M. 1317. Rex v. Hann, T. 5 Geo. 3. 3 B. M. 1716.*]

[Justices found guilty, or confessing information for refusing licence, on bad motives, (as for differing from them in election matters,) shall appear in person to receive judgment. Judgment in this case was a month's imprisonment, and 50*l.* fine a-piece. *Rex v. Hann, M. 6 Geo. 3. 3 B. M. 1786.*]

[For spirituous licences, and penalties of selling without, *vide stat. 23 Geo. 2. c. 40.*]

[By *stat. 26 Geo. 2. c. 13.* no brewer, distiller, maltster, or inn-keeper, can grant ale licence, nor act as a justice relating to distillery.]

[The penalties cannot be reduced under 5*l.*]

[Head office of excise may grant licences within their limits, to persons renting houses of 12*l. per annum*, tho' not rated.]

[By *stat. 26 Geo. 2. c. 31.* justices licensing alehouses shall take recognizance for good order, and send them to clerk of the peace, on pain of 3*l.* 6*s.* 8*d.* on justice signing licence and not sending recognizance.]

[Licence shall not be granted to person not licensed the year preceding, without a certificate from parson, vicar, or curate, and majority of churchwardens and overseers, or else of three reputable and substantial housekeepers in the parish.]

[Licensed person dying, another with certificate, signed by a justice in thirty days, may keep it open.]

[Licence does not entitle any person to keep alehouse in any other place than that in which it was first kept by virtue of it.]

[Licence to be granted at a general meeting of the justices acting in that division, on 1st September, or within twenty days after, for one year only, to commence on 29th.]

[Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant licences, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day. *Rex v. Sainbury, M. 32 G. 3. 4 T. R. 451.*]

[But if, after such appointment, the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal, and the subject of an indictment. *Ibid.*]

[An information will be granted against a justice of the peace as well for granting as for refusing a licence improperly. *Rex v. Holland, E. 27 Geo. 3. 1 T. R. 692.*]

[One justice, if on complaint he thinks recognizance forfeited, may summon offender to appear at quarter sessions, and bind any person to appear and give evidence; sessions may order jury to inquire, and if they find condition broken by act specified in complaint, sessions shall adjudge him guilty of breach, and the recognizance shall be estreated, and

and the party disabled to sell ale, &c. for three years, and all licences to him void.]

[If a justice suspects a person sells ale, &c. without licence, he may summon him and exciseman to produce books; and if it appears by his books or oath, that he is charged as a victualler, and is not entitled to the allowance of common brewer, he shall be deemed an alehouse-keeper.]

[Justice may summon party and evidence, and if they do not appear, or refuse to be examined, forfeit 10*l*.]

[Person disabled from selling ale is disabled from selling spirits.]

[Persons selling ale without licence, forfeit for first offence 40*s*. second 4*l*. third 6*l*. for want of distress to be committed one month for first, two months for second, and till discharged by quarter sessions, for third offence.]

[And by *stat. 5 Geo. 3. c. 46.* costs and expences. One justice may determine in a summary way, and on non-payment commit for one, two and three months, for first, second and third offences, and all subsequent.]

[Convictions to be returned to next quarter sessions and filed.]

[By *stat. 29 Geo. 2. c. 12.* Ale licences to be on 20*s*. stamp.]

[Person dying or removing, his representatives may sell without certificate from justice.]

[Alehouse becoming empty after licensing day, two justices may grant licence till next licensing day.]

[Person selling ale in a prison, house of correction, or workhouse, shall take out licence.]

[By *stat. 13 Geo. 3. c. 56.* person retailing spirits without licence forfeits 50*l*. to be recovered in *Westminster-Hall*, or by the excise-laws. Excise or justice must not mitigate to less than 5*l*.

[A person who sells spirituous liquors by retail, without a licence, is liable to the penalties of the *stat. 5 Geo. 3. c. 46.* tho' he has a licence from the commissioners of excise. *Rex v. Downes, H. 30 Geo. 3. 3 T. R. 560.*]

[The exception in the *stat. 26 Geo. 2. c. 28.* that nothing in that act shall extend to alter the time of granting licences in cities and towns corporate does not exempt such places from the operation of the other parts of that act; but magistrates in such districts must give the same notice of their meeting to grant licences as justices for a county give. *Ibid.*]

(B 27.) Ought not to permit tippling.] By the *st. 1 Jac. 9.* (made perpetual by the *st. 21 Jac. 7.*) if any inn-keeper, victualler, alehouse-keeper, (and by the *st. 1 Car. 4.* any taverner, keeping also an inn, or victual-house,) permit any inhabitant, (or by the *st. 1 Car. 4.* any foreigner,) not accompanying a traveller during his needful abode there, nor a labourer or handicraftsman in a corporation or market town on a work-day for one hour to take diet, nor a labourer or workman for work sojourning there, nor for urgent occasions, to continue tippling in such inn, &c. shall forfeit 10*s*. to the poor on view of the mayor, justice of peace, &c. or, by the *st. 21 Jac. 7.* on confession, or one witness, to be levied by the constable or churchwarden by distress, and on non-payment in six days, by sale, &c. and for want of distress the offender to be committed till payment. And a constable or

or churchwarden neglecting to levy, &c. or certify want of distress in twenty days to the mayor, justice of peace, &c. forfeits 40*s.* to the poor, to be levied by distress, and on non-payment in six days, by sale, and for want of distress shall be committed till payment.

By the *st.* 4 *Jac.* 5. and 21 *Jac.* 7. if an inhabitant or foreigner continue tippling, &c. unless for urgent occasions to be allowed by two justices of peace, or the causes expressed in the *st.* 1 *Jac.* 9. he shall forfeit 3*s.* 4*d.* for every offence to the poor, to be levied after view of the mayor, justice of peace, or by the *st.* 21 *Jac.* 7. confession or proof of one witness, at assises, sessions, or leet, by distress or warrant from the court, or justice of peace; and if the person be unable, the mayor, justices of peace, or court may set him in the stocks for four hours. But the offender must be convicted in six months.

By the *st.* 7 *Jac.* 10. an alehouse-keeper convicted for suffering tippling contrary to the *st.* 1 *Jac.* 9. shall be disabled to keep an alehouse for three years.

By the *st.* 21 *Jac.* 7. the oath of an offender confessing, is sufficient proof to convict any other offender of an offence against the *st.* 1 *Jac.* 9. and 4 *Jac.* 5.

An alehouse-keeper, convicted of tippling in another alehouse, shall be disabled for three years; upon conference of the *st.* 4 *Jac.* 5. and 7 *Jac.* 10. *Dalt.* 28. (edit. 1727. 34, 35.)

Or, of any offence against the *st.* 1 *Jac.* 9. 4 *Jac.* 5. or 21 *Jac.* 7. *H. P. C.* 147. *Vide Dalt.* 35.

[By *stat.* 30 *Geo.* 2. *c.* 24. keeper of public-house suffering journeymen, labourers, servants, or apprentices, to game in his premises, forfeits 40*s.* for first offence, and 10*l.* for every other.]

(B 28.) *Drunkenness.*] By the *st.* 4 *Jac.* 5. and 21 *Jac.* 7. any convicted of drunkenness by view of any justice of peace, confession, or oath of any witness, tho' the party confessing, at the assises, sessions, or leet, or presentment, &c. or before any justice of peace within six months, forfeits for the first offence 5*s.* to the poor, to be levied on warrant from the court of justice by distress, and if unable to pay, shall be committed to the stocks for six hours: for the second offence shall be bound with two sureties in a recognizance of 10*l.* to be from thenceforth of good behaviour.

By the *st.* 7 *Jac.* 10. and 21 *Jac.* 7. an alehouse-keeper convicted of drunkenness shall be disabled to keep an alehouse for three years.

By the *st.* 4 *Jac.* 5. a constable, &c. neglecting his duty, forfeits 10*s.* to the poor, to be levied on warrant from the mayor, justice of peace, or court where the conviction is.

#### (B 29.) Barretry.

So, by the *st.* 34 *Ed.* 3. 1. justices of peace shall have power to restrain rioters, and all other barretors, and to take, pursue, arrest, and chastise them according to their offence, and to cause them to be imprisoned and punished according to law.

*Vide Barretry (C).*

#### Bastardy.

As to bastardy, *vide Bastard*, (G 1, 2, 3.)

Bridges.



## Bridges.

As to bridges, *vide Chimin*, (B 1, &c.)

## (B 30.) Deceit.

(B 30.) *In innholders.*] By the *st.* 21 *Jac.* 21. (which repeals former statutes for this matter) if an innholder make horse bread, a baker being in the town, or sell not the same, and his oats, provender, hay, and victuals both for man and beast at reasonable prices, the justices of peace in a county, or corporation, may hear and determine, &c. and for the first offence, the innholder shall be fined; for the second imprisoned for a month, without bail; for the third be set in the pillory; and for the fourth forejudged of keeping an inn again.

(B 31.) *In weights and measures.*] *Vide post.* (B 87—93.)

(B 32.) *In victuallers.*] Justices of peace may inquire of any thing done to the fraud or deceit of another.

(B 33.) *Other fraud.*] As, if a man read a writing to an illiterate person, in other words than it was wrote, by which means he seals it.  
1 *Sid.* 312.

If a man play with false dice. *R.* 2 *Roll.* 107.

[By *stat.* 17 *Geo.* 2. *c.* 35. three justices may set the retail price of coals; and if the retailer refuses to sell at that price, they may empower officer to force entrance into any place where such coals are stored up, and to sell them at that price.]

[By *stat.* 31 *Geo.* 2. *c.* 24. one justice may bind over a person accused of obtaining money by false pretences.]

[Whoever pawns, exchanges, or disposes of goods without owner's consent, forfeits 20*s.* and on default may be committed to hard labour for fourteen days, if not sooner paid; if not paid three days before expiration, to be whipt.]

[Several regulations for pawnbrokers.]

## (B 34.) Tythes neglected.

By the *st.* 27 *H.* 8. 20. on request of the spiritual judge in a suit of tythes, two justices of peace (1 *Qu.*) may attach the defendant and commit him without bail, till he find surety by recognizance to obey the proceedings, &c. of the ecclesiastical court. *Vide Difmes*, (M 4.)

So, by the *st.* 32 *H.* 8. 7. till he find surety by recognizance to obey the sentence definitive, &c.

By the *st.* 7 & 8 *W.* 3. 6. (continued by the *st.* 10 & 11 *W.* 3. 15. until 1705) if any substract small tythes, &c. or composition, not above the value of 40*s.* for twenty days after demand, unless in *London*, or town where settled by act of parliament, on complaint, within two years, in writing, to two justices of peace, neither interested in the tythes, nor patron, &c. they may summon in writing the party, and on appearance or default, the summons being proved by oath, may examine evidences, and in writing under hand and seal determine the cause,

cause, and give costs, not above 10s. And on non-payment by ten days after notice may by warrant to constables, &c. distrain for the money adjudged, and if not paid in three days, sell, &c. And if the party remove into another county, &c. may certify the judgment to the justices of peace there, who shall levy, &c. But the party grieved may appeal to the quarter sessions, who shall finally determine, and if they affirm, may give what costs they think fit, to be levied by distress and sale, &c.

And no writ, &c. shall remove or supersede, &c. unless the title of the tythes come in question; but if the party insists before the two justices on a prescription, *modus*, &c. in writing under his hand, and gives security to pay all costs if the *modus*, &c. be found against him, the justices shall make no judgment, or if a suit hath been for the same matter in the *Exchequer*, or ecclesiastical court. And the party shall inroll the judgment of the two justices at the quarter sessions, which shall be a bar, &c. to another suit: but if the complaint be frivolous, the justices may give costs, not above 10s. against the complainant.

By the *st.* 7 & 8 *W.* 3. 34. if a quaker refuse great or small tythes or church rates, the two next justices of peace may convene him, examine the truth of the complaint, state what is due not above 10l. and by order under hand and seal appoint payment, and on refusal, &c. levy by warrant from any of the said justices by distress and sale, &c. unless he appeal, as he may, to the next quarter sessions of the county or corporation, who shall finally determine, and, if judgment continued, give costs against the appellant, to be levied by distress and sale, &c. Made perpetual, 1 *Geo.* 6.

[If the order does not specify that the complaint was *in writing*, it will be quashed. *Rex v. Furness*, *H.* 6 *Geo.* *Str.* 264.]

[It is not sufficient ground to obtain a *certiorari*, on an order for quaker's tythes, or customary payments, that they allege that the title is in question, without shewing on what footing it is controverted; especially if it appears that their lands always paid, and that they bought them subject to such payment. *Rex v. Wakefield*, *H.* 31 *Geo.* 2. 1 *B. M.* 485.]

#### (B 35.) Extortion.

So, justices of peace have authority by their commission to inquire of extortion. *Vide Extortion.*

(B 36.) What fees are allowed, *vide Extortion* (D).

(B 37.) What not, *vide Extortion* (E).

#### (B 38.) Forestalling.

By the *st.* 5 & 6 *Ed.* 6. 14. justices of peace may inquire, &c. of forestalling, regrating, and ingrossing against the statute at the quarter sessions, by presentment, and examination of two witnesses, &c. and may award process as on an indictment, and estreat fines, &c. and for the moiety of the informer award execution by *fieri facias*, or *capias*.

By

By the *st.* 31 *Ed.* 1. *Raft.* a forestaller is declared to be *depressor pauperum* and a public enemy, who shall not be suffered in any town, but for the first offence shall be amerced and lose the goods bought, for the second be set in the pillory, for the third imprisoned and ransomed, for the fourth abjure the realm. 3 *Inst.* 196.

By the *st.* 25 *Ed.* 3. 3. a forestaller of victuals or merchandize, coming by land or water, shall forfeit the goods or value, and, if not responsible, suffer two years' imprisonment; if convicted at the suit of the party, a moiety to the king, and a moiety to the party.

By the *st.* 5 & 6 *Ed.* 6. 14. he that buys merchandize, victuals, or other thing, coming by land or water to a market, fair, or port to be sold, or makes a bargain or promise for any thing so coming, or by message or otherwise motions the enhancing the price, or dissuades any coming from bringing such things to market, fair, or port, is a forestaller; and being convicted within two years after, shall, for the first offence, suffer two months' imprisonment without bail, and forfeit the value of the goods; for the second offence half a year's imprisonment, and double the value of the goods; for the third offence be set in the pillory, lose all his goods, and be imprisoned during the king's pleasure.

By the *st.* 5 *El.* 5. no statute against forestalling shall extend to buying so much unsalted fish, or mud-fish, wine, oil, or salt by way of forestalling, as shall be brought in an *English* vessel into some port in this realm.

*Forestall* is derived from *fare, via, and stall, impedimentum*: and, by the common law, regrating and ingrossing were comprehended within forestallment. 3 *Inst.* 195.

But it is no forestallment to buy at *Billingsgate*; for it is a market *R. Sh.* 292.

[*Stat.* 12 *G.* 3. c. 71. repeals 3 & 4 *Ed.* 6. 5 & 6 *Ed.* 6. 3 *Ph.* & *M.* 5 *Eliz.* 15 *Car.* 2. and part of 5 *Ann.* and all acts enforcing them.]

### (B 39.) Regrating.

By the *st.* 5 & 6 *Ed.* 6. 14. he that regrates, or gets into his possession in any fair or market, any corn, wine, fish, butter, cheese, tallow, candles, sheep, lambs, &c. or dead victual brought there to be sold, and sells the same again in the same, or other fair or market within four miles, is a regrator, and being convicted within two years after shall suffer, &c. *ut Forestaller ante*, (B 38.)

Provided, a subject dwelling within a mile of the main sea, may buy fresh or salted fish, and sell the same again at reasonable prices.

And if any buy any oxen, &c. sheep, lambs, calves, or goats living, and sell the same alive, without keeping them five weeks on his own grounds, he shall forfeit double the value of the cattle, a moiety to the king, a moiety to the prosecutor, &c. unless a drover, licensed by three justices of peace, (1 *Qu.*) who may buy cattle, and sell them again in fairs or markets, at forty miles distance.

By the *st.* 5 *El.* 5. the statutes against regrators shall not extend to buying out of any *English* vessel so much unsalted or mud-fish, wine, oil, or salt by way of regrating, as shall be brought into port in this realm.

A regrator, *alias dicitur*, a chopper, or jobber. 3 *Inst.* 195. *marg.* (B 40.)



(B 40.) Ingrossing.

(B 40.) *What shall be.*] By the *st. 5 & 6 Ed. 6. 14.* he that gets into his hands by buying or contract, (and not as tythes or lessee,) any corn, butter, cheese, fish, or other dead victual within the realm, with intent to sell again, is an ingrosser.

Ingrossing was an offence, and indictable by the common law. *3 Inst. 195, 196.*

As, if a merchant foreigner, or subject, buy victuals or merchandize within the realm in gross, and sell them presently in the gross. *R. by all the J. 3 Inst. 196.*

An ingrosser by the common law was comprehended under the word *forestaller*. *Ibid.*

And every enhancement of prices was an offence; for it was *quasi* a forestalment. *Ibid.*

As, if a man had sold corn in sheafs. *3 Inst. 197.*

If by false rumours he enhances the prices. *3 Inst. 196.*

So, a fishmonger, or any in trade, may be indicted for ingrossing, if he buys going to market, or by retail, to enhance the price. *1 Rol. 11.*

Within the *st. 5 & 6 Ed. 6. 14.* salt is a victual, and the ingrossing punishable. *R. 3 Inst. 195. Dub. Cro. Car. 231.*

And every thing for the necessary use of man, in eating and drinking. *3 Inst. 195.*

An indictment for buying, *ad intentione ad revendendum*, is sufficient, and after verdict it shall not be intended of a revendition by retail. *R. Cro. Car. 315. Jon. 320.*

And it need not say, *that he had it not by demise, &c.* for that shall be shewed on the other side in evidence. *R. Jon. 157.*

If the informer prays the forfeiture *ad valorem* of the thing ingrossed, without saying the sum, it is sufficient. *Ibid.*

And it is sufficient, if he prays the moiety for himself, and demands nothing for the king. *Ibid.*

(B 41.) *What not.*] But it will not be ingrossing by the common law, if a merchant buys out of the realm, and imports and sells in the gross. *R. 3 Inst. 196.*

So, by the *st. 13 El. 25.* he shall not be an ingrosser who buys wine, oil, sugar, currants, spice, or other foreign victuals.

So, by the *st. 5 & 6 Ed. 6. 14.* he shall not be an ingrosser, if he buy barley or oats, and convert it into malt or oatmeal in his own house, and then sell it.

Tho' he buy foreign oats. *R. Hard. 231.*

So, if he buy corn, with intent to convert it to meal, and then sell it. *Per two J. Mo. 595.*

Or, to convert it to starch. *R. Bridg. 6.*

So, by the same statute of *5 & 6 Ed. 6. 14.* if a fishmonger, butcher, poulterer, innholder, or victualler, buy what belongs to their trade or employ, to sell by retail.

Or, if any buy salted or dried fish, herrings, or sprats, and sell at reasonable prices. *Vide 2 Bul. 249.*

So, by the same statute, if any buy corn to seed his ground; but if he have of his own corn sufficient to seed his ground and find his house for

for a year, and brings not to market as much as he bought, he shall forfeit double the value of what he bought.

Or, if a badger, &c. allowed by three justices, buy corn, butter, cheese, or fish to be sold within a month in a fair, or market, or to any person for provision of his house, or buying for the provision of a corporation, ship, or fort, &c. it is no offence, without forestalling.

And by the *st.* 5 *El.* 12. a badger, drover, &c. must be, or have been married, be an householder, thirty years old, and allowed in the quarter sessions.

By the *st.* 15 *Car.* 2. 7. every person may buy corn in open market to lay up and sell again at these prices, *viz.* wheat 48*s.* rye 32*s.* barley or malt 28*s.* buck-wheat 28*s.* oats 13*s.* 4*d.* peas and beans 32*s.* *per* quarter (not forestalling, nor selling again in the same market within three months).

So, apples, plums, cherries, or other fruit are not victual, being more for pleasure than necessity. *R. & Aff. in Error*, 3 *Inst.* 196. *Cro. Car.* 231. 2 *Cro.* 214.

Nor, hops. *Cro. Car.* 231.

(B 42.) Game.

(B 42.) *Unlawful sports.*] By the common law, recreations by cards, dice, &c. were not prohibited. 11 *Co.* 87. *b.*

And therefore the king cannot prohibit the making of cards, dice, &c. *Ibid.*

And such recreations are not *mala in se*, for the king may license them. *Ibid.*

But by the *st.* 33 *H.* 8. 9. none shall keep a common house, or alley, for bowls, coys, tennis, dice, cards, or other unlawful game, without a placard, &c. on pain of 40*s.* for every day. *Vide infra* 2 & 3 *Ph. & M.* 9. *Vide Leet*, (L 14.)

[Playing at bowls, out of *Christmas*, subjects every labourer to the penalty of this statute, but does not make him an idle and disorderly person, under *st.* 17 *G.* 2. c. 5. *Corup.* 36.]

And none shall haunt or play at such houses or games on pain of 6*s.* 8*d.* for every time.

No artificer, husbandman, labourer, apprentice, journeyman, mariner, fisherman, or servant, shall play at such games, unless at *Christmas* in the master's house, or in his presence by his licence, on pain of 20*s.* for every time.

And justices of peace, mayor, &c. shall search once a month (if need be) on pain of 40*s.* after such houses or games, and shall imprison the keepers or haunters of them, till they find surety by recognizance not to do so.

[By the *st.* 30 *Geo.* 2. 24. *f.* 14. persons keeping public houses, &c. suffering gaming there by journeymen, labourers, servants, or apprentices, and convicted by justices of peace, shall forfeit 40*s.*, and for every offence afterwards 10*l.*]

And by the *st.* 2 & 3 *Ph. & M.* 9. every placard, for keeping a bowling alley, dicing house, or other unlawful game, shall be void.

Playing at nine pins is an unlawful game within this statute. *Adm.* 1 *Sid.* 247.

So, keeping a cockpit.

So, by the *st.* 10 & 11 *W.* 3. 17. lotteries are common nuisances, which none shall keep on 500 *l.* nor play at, on 20 *l.* penalty.

By the *st.* 16 *Car.* 2. 7. if any win by cosenage at cards, dice, tables, tennis, bowls, skittles, shovel-board, cock-fighting, dogmatch, horse-race, foot-race, or other game or pastime, he forfeits the treble value, a moiety to the king, a moiety to the loser, if he sue in six months; otherwise to any who prosecutes in the courts of *Westminster*, &c.

So, by the *st.* 9 *Ann.* 14. after 1st *May* 1711, if any lose at any time or sitting by play, or betting to one or more persons, in the whole, the sum or value of 10 *l.* and pay the same, he may in three months next recover the money from the winner.

[And the assignees of a bankrupt, who was the loser, may maintain the action. *Brandon v. Pate*, *C. P. E.* 34 *Geo.* 3. 2 *H. Bl.* 308.]

[If the parties play from *Monday* evening to *Tuesday* evening without any interruption, except for an hour or two, to dinner, this is all one sitting; for to lose at one sitting, is to lose in a course of play where the company never parts, tho' they may not actually be gaming the whole time. 2 *Bl. Rep.* 1226.]

[If five guineas be betted against ten, the party who wins the five guineas cannot recover them, because by this statute the other could not have recovered the ten, and therefore there is no mutuality. 2 *Bl. Rep.* 706.]

[And by 18 *G.* 2. *c.* 34. if any person shall win or lose at play, or by betting at any one time, the sum or value of 10 *l.* or within the space of twenty-four hours the sum or value of 20 *l.* he shall be liable to be indicted for such offence, within six months either in the *B. R.* or at the assizes; and being convicted shall be fined five times the value of the sum lost or won, which (after such charges as the court shall judge reasonable allowed thereout to the prosecutor and evidence) shall go to the poor. *Vide the Statute.*]

[If defendant is convicted on 9 *Ann.* *c.* 14. which gives five times the value to a common informer, the judgment is only, *quod convictus est*, and an action for the forfeiture must be brought on the judgment. *Rex v. Lookup*, *T.* 9 *G.* 2. *Str.* 1048.]

By the *st.* 16 *Car.* 2. 7. if any play at any of the said games *supra*, or any other game, (not for ready money,) or bet on the side of a player, and lose above 100 *l.* on tick at any one time, &c. he shall not be bound to pay, but all judgments, bonds, &c. for the same shall be void: and the winner shall forfeit treble the value of what he wins above 100 *l.* a moiety to the king, a moiety to him who will sue by debt, information, &c. and treble costs.

[Horse-racing is gaming within *stat.* 16 *C.* 2. *c.* 7. and money won as a wager on it cannot be recovered. *Goodburn v. Marley*, *M.* 15 *G.* 2. *Str.* 1159. *Blaxton v. Pye*, *P.* 6 *G.* 3. 2 *Wilf.* 309.]

If he lose at the same meeting above 100 *l.* to several persons, it will be within the statute. *R.* 3 *Keb.* 671. *R. Lut.* 180. If partners 1 *Sal.* 345. *Vide infra.*

If he lose 80 *l.* and then agrees to play another time, when he loses 80 *l.* more; it shall be said to be all lost at one time and meeting. *D.* 5 *Mod.* 6. *Dub.* 2 *Mod.* 54.

If there be an agreement for four heats at an horse-race, and the action



action is for two heats, which was under 100*l.* *Per Holt, T. 8 W. 3. R. 1 Vent. 253. 2 Lev. 94. Skin. 573.*

If a bill be drawn for the money upon *B.* who accepts it, yet it shall be void. *T. 8 W. 3. Jacob v. Hufsey, B. R. 1 Sal. 344. 5 Mod. 175. Com. Rep. 4. S. C.*

By the *st. 9 Ann. 14.* all notes, bonds, judgments, mortgages, &c. where all or any part of the consideration was for money won at cards, dice, tables, tennis, bowls, or other game, or by betting, or lent to any when gaming or betting, shall be void.

And the mortgage, &c. shall enure for the sole benefit of him, who would be entitled to the lands after the death of the mortgagor; and all conveyances to prevent the same shall be fraudulent and void.

[And a bill in equity will lie to have the security delivered up, and money paid in part refunded. *Rawdon v. Shadwell, cited Burn, tit. Gaming.*]

[Money lent at play on a man's bare word may be recovered, for it is not within *stat. 9 Ann. c. 16.* which has not the word *contract.* *Barjeau v. Walmsley, H. 19 G. 2. Str. 1249.*]

[*A.* gives a bill of exchange drawn by himself on himself, and accepted by himself, to *B.*; part of the consideration is money lost at play, the rest money lent at the time and place of play; *B.* cannot recover any thing on the bill of exchange, but he can recover the money lent on the contract, and shall have interest from the time the bill became payable to the judgment. *Robinson v. Bland, M. 1 G. 3. 2 B. M. 1077. Vide Doug. 741.*]

[If *A.* gives a note to *B.* for money by him knowingly advanced to *A.* to game with at dice, and *B.* indorses it for a full consideration to *C.* who is ignorant that any of the money had been lent for gaming, yet *C.* cannot maintain action for it. And *Lee Ch. J.* said the dictum of *Holt Ch. J.* in *Hufsey v. Jacob*, was not the point adjudged, and all the bar wondered at it. *Bowyer v. Bampton, T. 14 G. 2. Strange, 1155.*]

[Cricket is a game within *st. 9 Ann.* and a bond given as a collateral security for money won at it, is void. *Jeffreys v. Walter, T. 21 G. 2. 1 Wils. 220. Cowp. 281.*]

[A foot-race is within *stat. 9 Ann. c. 14.* but if *A.* lays a wager with *B.* that *C.* cannot run on a certain day four miles in twenty-one minutes and a half, and *C.* does run it, and the money is paid to *B.* if it is not laid that *C.* was playing at a game called a foot-race, such wager is not betting within the statute. *Lynall v. Longbotham, M. 30 Geo. 2. 2 Wils. 36.*]

[One person running alone against time, is a foot-race. *Cowp. 281.*]

But, if at play, a man makes a wager above 100*l.* for a thing which relates to the play, it is not within the statute; for it is a collateral matter: as, a wager, whether a cast touch at back-gammon ought to be removed. *R. 5 Mod. 6. 4 Mod. 409. 1 Sal. 344. Skin. 572.*

[No action will lie on a wager respecting the mode of playing an illegal game; therefore the judge at *Nisi Prius* ordered a cause upon the following subject to be struck out of the paper, *whether there were more ways than five of nicking seven on the dice, allowing seven to be the main,*

main, and eleven a nick to seven, because all games with dice are prohibited. *Brown v. Leeson*, C. P. Trin. 32 Geo. 3. 2 H. Bl. 43.]

So, if a bill be for money at play, to the winner or order, and that is assigned for a just debt, and accepted in the hand of the assignee, it shall not be within the statute, as to the assignee. *Per Holt in B. R. T. 8 W. 3. Hussy and Jacob*, 1 Sal. 344. R. 2 Mod. 279. *Vide Doug. 636. contra.*

So, it is not within the statute, if a man lose 100*l.* to one, and afterwards 100*l.* to another; for it is a several contract. R. 1 Sal. 345. *Vide supra.*

So, if he lose 2000*l.* in ready money, and afterwards 100*l.* more upon tick. R. 1 Sal. 345. R. 1 Sid. 394.

How the *§. 16 Car. 2.* shall be pleaded in bar, to a debt, &c. (*Vide in Pleader*, 2 G 8.—2 W 26.)

[*B. R.* may give leave to prosecutor to compound a prosecution for gaming. *Anon. P. 19 G. 2. 1 Wilf. 130.*]

[By 12 G. 2. c. 28. *§. 1.* persons setting up, &c. a private lottery, forfeit 200*l.* one-third to the informer, two-thirds to the poor of the parish, on conviction, on the oath of one witness before one justice.]

[By *§. 2.* the same for ace of hearts, pharaoh, basset, and hazard.

[And by 13 G. 2. c. 19. *§. 9.* to passage, and all games with dice, except backgammon, &c.]

[By *§. 3.* adventurers at them forfeit 50*l.*]

[*§. 4.* All sales by such devices void, and the lands or goods forfeited to whoever will sue.]

[As to lotteries, *vide the §. 27 Geo. 3. c. 1.*]

[This statute, which takes away the summary jurisdiction of magistrates over offences concerning the lottery, extends only to *state lotteries*, and does not repeal their power over games of chance or lotteries prohibited by *stat. 12 G. 2. c. 28. Rex v. Liffon*, T. 33 G. 3. 5 T. R. 338.]

[The premium advanced on insurance of lottery tickets may be recovered back, tho' the money won on the insurance cannot. 2 Bl. Rep. 1073.]

[By 13 G. 2. c. 19. *§. 1.* no person shall start any horse at a horse-race, unless his own property, on pain of forfeiture of such horse; nor, more than one, on pain of forfeiting all but the first.]

[By *§. 2.* no prize to be under 50*l.* value; if any person starts for less, 200*l.* penalty; if any person advertizes a less prize, 100*l.* penalty.]

[(By *§. 3.* five year olds were to carry ten stone, six year olds eleven stone, and seven year olds twelve stone, on pain of 200*l.* But this is repealed 18 G. 2. c. 34. *§. 1.*) tho' it is the most material clause for the preservation of the breed of horses, and for the prevention of gaming.]

[By *§. 4.* the race must begin and end the same day.]

[*§. 5.* No match shall be for less than 50*l.* unless run at Newmarket, or Blackhambleton, on pain of 200*l.*]

[*§. 6.* Penalties to be recovered in *Westminster-Hall* or assizes, half to the informer, half to the poor where the offence committed; and in *Somersetshire* to *Bath* hospital.]

[*§. 7.* Entrance-money shall go to the second best horse.]

[*§. 8.*

[§. 8. This act does not extend to any prizes then issuing out of lands or money chargeable therewith.]

[A horse-race for 25 *l.* a side play or pay tho' one gives the other 5 *l.* to make the match, is a match for 50 *l.* *Bidmead v. Gale, P. 9 G. 3. 4 B. M. 2432.*]

[By *stat. 18 Geo. 2. c. 34.* the penalties of *stat. 12 G. 2. c. 28.* are extended to the game of roulette, *alias* roly-poly, and all prohibited games with cards or dice.]

[By §. 3. courts of equity are empowered to enforce their decrees in suits brought on *stat. 9 Ann. c. 14.* (for discovery of money lost at play) in the same manner as in other suits.]

[By §. 5. justices, &c. may summon witnesses, who not attending, or refusing to give evidence, or giving false evidence, forfeit 50 *l.* or suffer six months imprisonment.]

[By §. 7. privilege of parliament taken away in prosecutions for keeping gaming-house.]

[By §. 8 & 9. persons winning or losing 10 *l.* at one time, or 20 *l.* in twenty-four hours, are indictable, and liable to a fine of five times the value; but if they inform, and convict another, they are discharged.]

[By 25 *G. 2. c. 36.* any house, room, garden, or other place kept for public dancing, music, or other entertainment of the like kind, in *London* or within twenty miles thereof, without licence, according to that statute (except *Drury-Lane, Covent-Garden, and Hay-Market Theatres*, and other entertainments exercised by letters patent or licence of the crown or lord chamberlain) shall be deemed a disorderly house or place, and the keeper thereof shall forfeit 100 *l.* with full costs to him who shall sue (in six months) in any of the courts at *Westminster*. And the person who shall appear to act as master, or as having the management of such disorderly house, shall be deemed a keeper thereof. *Vide the st. at large.*]

[And also the *stat. 10 Geo. 2. c. 28.*]

[Tumbling is not an entertainment of the stage within the meaning of this latter act. *Rex v. Handy, E. 35 G. 3. 6 T. R. 286.*]

(B 43.) Shooting, *vide Leet, (L 14.)*

By the §. 33 *H. 8. 6.* none shall use or keep a hand-gun, not a yard long in the stock and barrel, or hagbut not three quarters of a yard long, on pain of 10 *l.*

None not having 100 *l. per annum* in his own or his wife's right shall shoot in, keep, or carry charged any cross-bow, hand-gun, &c. unless to shoot at a butt or bank of earth, in a place convenient, on pain of 10 *l.*

None shall shoot within a quarter of a mile of a city, borough, or market town, on 10 *l.* unless at a butt or bank.

No servant, by command of his master, shall shoot at a deer or fowl on pain of 10 *l.* but may carry a gun for his master, or to be mended, if he have licence in writing so to do.

But none shall be punished till twenty days past after proclamation made of this statute in that county; nor any gunsmith, maker, or seller of guns, nor inhabitants within five miles of the sea, twelve miles of *Scotland* or in the isles of *Jersey, Guernsey, Anglesea, Wight, or Man*, nor the owner of a ship for trial or necessary use of a gun.



Any, who hath 100*l. per annum*, may take away the cross bow, from an offender to his own use, and a gun under due length, which he shall break, on pain of 40*s.* and keep to his own use.

And every one may carry an offender to a justice of peace, who may commit till payment of the 10*l.* a moiety to the king, a moiety to the first bringer of the offender to a justice of peace.

And the sessions of peace may hear and determine the offence, and fine not less than 10*l.* on an indictment or information, at the suit of the king within a-year, of the party within half a-year after the offence: and if the jury wilfully conceal may summon another jury to inquire of the concealment, and if found fine the first jurors 20*s.* a-piece.

Pistols, daggs, stone-bows, &c. are within the prohibition of this statute. *R. 5 Co. 71. b.*

The conviction upon it must be before the next justice of peace. *Semb. 1 Sand. 263.*

It must be alleged certainly, that he had not 100*l. per annum* at the time of the offence. *R. 3 Mod. 280.*

He must be carried directly before the next justice. *4 Mod. 147.*

But carrying a gun by a sheriff or his ministers, in the execution of justice, is not prohibited by the statute. *R. 5 Co. 72. a.*

So, having a gun in the house without using it, is not within the statute. *R. Sho. 48.*

By the *st. 1 Jac. 27.* any convicted before two justices on confession or by two witnesses, for killing with a gun, cross-bow, &c. or shooting at any pheasant, partridge, pigeon, hearn, duck, teal, widgeon, grouse, heathcock, moor-game, or hare, shall be committed (till he pay 20*s.* to the poor of the parish for every pheasant, &c.) for three months without bail, unless after one month he give a recognizance of 20*l.* with surety to two justices to be returned to the quarter sessions, not to shoot at or kill, &c. at any time after: and the justices at quarter sessions may hear, &c.

Provided a person licensed at the quarter sessions may kill small birds for hawks' meat, so he give a recognizance of 20*l.* not to shoot at any game prohibited by this law, nor within 600 paces of any hearnery, nor 100 paces of a dove-house, nor in a park or forest.

By the *st. 3 Jac. 13.* a person not having 40*l. per annum* in land, or 200*l.* in goods, or ground for deer or conies of 40*s. per annum* using a gun, bow, &c. to kill deer, &c. any having 100*l. per annum* in land may take such gun, &c. to his own use.

By the *st. 22 & 23 Car. 2. 25.* persons not having an inheritance of their own, or their wife's of 100*l. per annum*, or 150*l. per annum* in an estate for lives or years, above ninety-nine, or heir apparent of an esquire or higher degree, or owner, or keeper of a forest, park, or warren stocked with deer or conies for necessary use, shall not keep or use any gun, bow, &c. And a lord of a manor, not under an esquire, may under hand and seal license a game-keeper, who may within his manor seize any gun, bow, &c. or with warrant of a justice of peace, may in day time search and seize to the use of the lord any gun, bow, &c. found in the house of a person not qualified. *Vide post. (B 46.)*

[In convictions on these statutes, much greater nicety is required than

than in a declaration in order that the court may see that the offence is within the jurisdiction of the justice, and that he has pursued his authority. *Cowp.* 827.

[In a declaration, "that the defendant used a gun being an engine, for the destruction of the game," is sufficient after verdict, tho' it might be bad on special demurrer. *Id.* 825.]

[But a conviction in the same terms is void unless it add that the defendant used it for the destruction of the game. *Doug.* 683. in the notes.]

[And in a conviction for killing game, the information must negative every one of the qualifications mentioned in this statute. *Doug.* 345.]

[Lord of a manor may appoint a gamekeeper with power to kill game, tho' he is neither a person qualified, nor a menial servant of the lord; and such gamekeeper has a right to carry a gun anywhere, tho' out of the manor; and tho' he kills game, or sports out of the manor, his gun cannot be taken from him; but if he kills game out of the manor, he is liable to the penalty. *Rogers v. Carter, M.* 9 G. 3. 2 *Willf.* 387.]

[A lord of a hundred or wapentake cannot grant a deputation to kill game. *Doug.* 28.]

[An esquire, or other person of higher degree, as such, is not qualified to kill game under this act, tho' the son of an esquire or of another person of higher degree is. 1 *T. R.* 44.]

[And a doctor of one of the *Scotch* universities is not, to this purpose, a person of higher degree. *Id. ibid.*]

By the *st.* 4 & 5 *W. & M.* 23. a person not qualified, &c. convicted before justices of peace on search by constable, &c. for keeping or using bows or other instruments for destruction of fish, fowl, or other game, shall pay not less than 5 *s.* nor above 20 *s.* a moiety to the informer, a moiety to the poor, to be levied by distress and sale, &c. And for want of distress, &c. shall be sent to the house of correction, for no less than ten days nor above a month.

[By *st.* 25 G. 3. c. 50. every person who shall use any dog, gun, net, or engine for the taking or destruction of game (not acting as a gamekeeper) shall previously deliver in a paper or account in writing, containing his name and place of abode, to the clerk of the peace of the county where he shall reside, and annually take out a certificate thereof, on which shall be charged a stamp duty of two guineas. *Vide the st. at large*, and *st.* 26 G. 3. c. 82.]

(B 44.) *Fishing.*] By the *st.* *W.* 1. 3 *Ed.* 1. 1. none, without licence, shall fish in another's vivary, (a place where fish are kept, 2 *Inst.* 162.) on pain of imprisonment, ransom, and double damages to the party, if he will sue, if not, the king shall have the suit as against the peace: and persons indicted shall be attached, and distrained to appear within a month, then a second *distringas* to appear in six weeks, and on default shall be convicted and fined.

By the *st.* *W.* 1. 20. misfeasors in fish-ponds shall make good amends, &c.

By these statutes, fishing in any fish-ponds, tho' no fish taken, is punished. 2 *Inst.* 200.

By the *st. W. 2. 13 Ed. 1. 47.* and *13 R. 2. 19.* none shall take salmon between 8th September and 11th November, nor young salmon with engines at mill pools between the middle of April and 24th June, nor with nets or engines destroy the fry of fish, on pain of having the nets burnt for the first offence, of imprisonment for a quarter of a year for the second, and of a whole year for the third offence. *2 Inst. 478.*

By the *st. 17 R. 2. 9.* justices of peace shall be conservators of the *st. W. 2. 47.* and *13 R. 2. 9.* and may appoint under conservators, and at sessions inquire of defaults, &c.

By the *st. 1 El. 17.* none shall take the young fry or spawn of fish, nor kill pike under ten, salmon under sixteen, trout under eight, or barbel under twelve inches fish, nor fish, unless for smelts, loaches, minnies, bulheads, gudgeons, or eels, but with an angle, or a net of of a mesh of two inches and half, on pain of 20*l.* of which justices of peace may inquire, if no presentment in the leet within a year. *Vide Leet, (L 14.)*

By the *st. 5 El. 21.* justices of peace may inquire of such, who break heads of fish ponds, or fish in several ponds, &c. who shall pay treble damages, three months imprisonment and seven years good behaviour, unless the justices think fit to remit it on confession of the fault, or unless the party release such surety.

By the *st. 3 Jac. 12.* none shall erect a wear, &c. in five miles of an haven, on pain of 10*l.* nor fish with a net of a less mesh than three inches, or with a canvas net, to destroy the fry or spawn of sea fish, on pain of forfeiting the net and 10*s.* to the poor and prosecutor, to be levied by distress and sale, on warrant of one justice or more, rendring the overplus, &c.

By the *st. 13 & 14 Car. 2. 28.* persons flocking about boats, &c. of pilchard craft in *Cornwall* and *Devon*, who refuse to depart being warned, on complaint to a justice of peace, shall forfeit 5*s.* to the poor, or be set in the stocks five hours.

By the *st. 22 & 23 Car. 2. 25.* a person convict, by confession or one witness, within a month after the offence, before any justice of peace, of taking fish in a river, pond, &c. or assisting thereto, without consent of the lord or owner, shall pay to the party, not exceeding treble damage, and to the poor not exceeding 10*s.* what the justice thinks meet, to be levied by distress and sale, &c. And in default, to be committed not exceeding a month, unless he give bond with surety not above 10*l.* never to offend more.

And the justice may destroy the nets, &c. taken: but the party may appeal to the sessions which shall be final, unless the title to the land or fishery be in question.

By the *st. 4 & 5 W. & M. 23.* none shall keep any net, &c. for taking fish, other than the owner or occupier of a river or fishery, or the maker or seller of such nets for better sale of them; and the owner of a river or fishery, or occupier, or any authorized by them, may seize to their own use nets, &c. used, or in the possession of a person fishing, &c. without consent, &c. And any, authorized by warrant from a justice of peace, may search houses of suspected persons, and seize nets, &c. to their own use or destroy them. Provided fishermen, and apprentices, may fish in navigable rivers with lawful nets, &c. [By



[By *ft.* 5 *G.* 3. *c.* 14. persons stealing fish from any river or pond in a park or paddock fenced in and enclosed, or from a garden, orchard, or yard adjoining or belonging to a dwelling-house, or aiding or receiving, to be transported for seven years on conviction at gaol-delivery.]

[For stealing fish in other inclosed ground, private property, forfeiture of 5 *l.* to the owner, or commitment for six months by one justice.]

[A conviction on this act must shew that the fishing, &c. was without consent of the owner, and it must appear upon oath who was the owner. 4 *Bur.* 2279.]

[If a man is convicted of *taking* fish, without saying of another person, or in another person's pond, or without the consent of the owner, (or *stealing*, *Qu.*) it is bad. *Rex v. Mallinson*, *M.* 32 *G.* 2. 2 *B. M.* 679.]

[In rivers not navigable land-owners have the right of fishing on each side, commonly to the middle of the stream: in navigable rivers, it is *prima facie* in the king, and is public: but a private person may have an exclusive right by grant or prescription. *Carter v. Murcot*, *H.* 8 *Geo.* 3. 4 *B. M.* 2162.]

(B 45.) *Fowling-hawks.*] By *Ch. de For.* 9 *H.* 3. 13. every free-man shall have the ayries of hawks in his own woods in the forest of the king.

By the *ft.* 34 *Ed.* 3. 22. he that finds an hawk, &c. shall bring it to the sheriff, who shall make proclamation of it, and the owner proving it to be his, shall have it, paying the charge; if none challenge it in four months, the finder if a gentleman, otherwise the sheriff, shall have it: but if any conceal or take away an hawk, &c. he shall suffer two years imprisonment, and pay the value of it. And by the *ft.* 37 *Ed.* 3. 19. stealing of an hawk is felony.

By the *ft.* 11 *H.* 7. 17. none shall take the eggs of a falcon, &c. out of the nest, be it on his own or another's ground, on pain of imprisonment for a year and a day, and fine at the king's will; a moiety to the king, a moiety to the owner of the ground where the eggs were taken, and to be determined by justices of peace, &c. Nor shall any take or drive to other coverts to breed in, or kill any falcon, &c. on pain of 10 *l.* a moiety to him that will sue, by action of debt, by examination before justices of peace, information or otherwise, and a moiety to the king.

By the *ft.* 23 *El.* 10. none shall hawk where eared corn is, without licence, on pain of 40 *s.* to the owner, to be recovered by action, information, &c. *Vide Leet*, (L 14.)

By the *ft.* 7 *Jac.* 11. any convict by confession, or two witnesses, before two justices of peace within six months, of hawking at a pheasant or partridge, between the 1<sup>st</sup> *July* and last of *August*, shall be committed for one month without bail, unless he pay 40 *s.* for hawking, and 20 *s.* for every pheasant and partridge killed, to the poor.

(B 46.) *Pheasants, partridges, &c.*] By the *ft.* 11 *H.* 7. 17. none of whatever degree shall take pheasants or partridges on the freehold of another, without his licence, on pain of 10 *l.* a moiety to the

the owner of the land, a moiety to the prosecutor by action of debt, or by bill or otherwise; nor the eggs of swans out of the nest, on pain of imprisonment for a year and a day, and fine at the king's will, a moiety to the king, a moiety to the owner of the swans.

By the *st.* 23 *El.* 10. none shall in the night take a pheasant, or partridge, on pain of 20*s.* for every pheasant, and 10*s.* for every partridge, a moiety to the lord of the manor, a moiety to the prosecutor, (or if either release his moiety,) to the poor, by action, &c. And justices of peace at sessions may hear, &c. and any justice bind the offender to sessions: and if he pay not the penalty in ten days, shall be committed for a month without bail, and find surety not to offend in two years. *Vide Leet*, (L 14.)

And none shall hunt with a spaniel, where eared corn is, without licence, on pain of 46*s.* to the owner.

By the *st.* 1 *Jac.* 27. any convict by confession, or two witnesses at sessions, or before two justices of peace, of taking, &c. any pheasant, partridge, or house-dove, or eggs of pheasant, partridge, or swan, shall be committed for three months without bail, unless he pays 20*s.* for every fowl and egg to the poor, or after a month's commitment shall find two sureties of 20*l.* by recognizance before a justice not to offend more. (So, by the *st.* 7 *Jac.* 11. if convict by one witness of taking a partridge, or pheasant.)

And any not having 10*l.* *per annum* inheritance, 30*l.* *per annum* for life, or 200*l.* in goods, or the son of an esquire, &c. convict, &c. for keeping a setting dog, or net for partridge, or pheasant, shall be committed, &c. unless he pay 40*s.* to the poor.

And he who sells, or buys to sell, any pheasant, or partridge, not reared up in the house, or brought from beyond sea, forfeits 20*s.* for every pheasant, and 10*s.* for every partridge.

By the *st.* 7 *Jac.* 11. any convict, within six months, by confession or two witnesses before two justices, for hawking at a partridge, or pheasant between the 1st *July* and last of *August*, shall be committed for one month without bail, unless he pay 40*s.* for every hawking, and 20*s.* for every pheasant, and partridge killed, to the poor of the parish.

And a constable, by warrant of two justices, may search houses of persons not qualified, and seize setting dogs, and nets; but persons having a warren, or lords of a manor, or inheritance of 40*l.* *per annum*, 80*l.* *per annum* for life, or goods of 400*l.* value, or their servants, may take pheasants, or partridges, on their own ground, between *Michaelmas* and *Christmas*.

By the *st.* 22 & 23 *Car.* 2. 25. a lord of a manor, not under an esquire, may under hand and seal authorise gamekeepers within his royalty, who may seize setting dogs, nets, &c. for killing pheasants, partridges, or other game used within his manor by any unqualified by this act, (*ut ante*, (B 43.) for shooting,) or by warrant of justice of peace, may in the day-time search houses of suspected persons unqualified, and seize setting dogs, nets, &c. to the use of the lord, or destroy them.

A manor is a royalty named by the statute. (*Vide Lut.* 1506.)

So, an hundred with a lect. *Semb. Lut.* 1506.

By the *st.* 9 *An.* 25. but one gamekeeper in one manor.

By the *st.* 3 *Geo.* 11. one qualified, or a servant.

By the *st.* 4 & 5 *W. & M.* 23. a constable, by warrant of a justice of peace, may enter and search houses, &c. of suspected persons unqualified: and if pheasant, partridge, pigeon, fowl, or other game be found, may carry the offender to the justice of peace; and if he cannot satisfy the justice how he came by it, or in a set time produce the feller, or prove the sale, he shall pay for every fowl, not less than 5*s.* nor more than 20*s.* a moiety to the informer, a moiety to the poor, to be levied by distress and sale, &c. And if no distress, shall be committed to the house of correction, not less than ten days nor more than a month, there to be whipt, and a person produced, &c. who shall not give such evidence to the justice of his innocence, and a person convict of having or using any setting dog, nets, &c. for destruction of fowl, shall forfeit, &c.

[By *st.* 2 *Geo.* 3. *c.* 19. none shall take, kill, or have any partridge, from 12th *February* to 1st *September*, nor pheasant from 1st *February* to 1st *October*, (except taken in lawful time, and kept in a mew,) nor any black game from 1st *January* to 20th *August*, nor grouse from 1st *December* to 25th *July* on pain of 5*l.* per bird.]

[All penalties on the game laws sued for in *Westminster-Hall*, shall go to the informer, and no part to the poor of the parish.]

[It is no defence to such an action that the defendant has a deputation from a person claiming to be lord of the manor; if there appear to be no ground for the claim. *Calcraft v. Gibbs*, *B. R. E.* 32 *Geo.* 3. 4 *T. R.* 681. *M.* 33 *Geo.* 3. 5 *T. R.* 19.]

[*St.* 2 *Geo.* 3. *c.* 29. inflicts 20*s.* penalty for killing pigeons, to be paid to the prosecutor, on conviction, before one justice, or commitment to hard labour from three to one month.]

By *st.* 13 *Geo.* 3. *c.* 55. none shall kill or have black game from 10th *December* to 20th *August*, nor grouse from 10th *December* to 12th *August*, on pain of from 20*l.* to 10*l.* for first, and from 30*l.* to 20*l.* for subsequent offence, by suit or before justice.]

(B 47.) *Hunting, deer-stealing.*] As to hunting in a forest, *vide Chase*, (H 1, &c.)

By the *st.* 13 *R.* 2. 13. he that hath not 40*s.* per annum lands, or a clerk that hath not 10*l.* per annum revenue, shall not keep a dog to hunt, or engines to take or destroy deer, &c. on pain of a year's imprisonment, which justices of peace may determine.

By the *st.* 19 *H.* 7. 11. none shall keep deer-hays or buckstall, save for his own park, &c. on pain of 10*l.* per month; nor use stalking for deer in other park, &c. without licence, on pain of 10*l.* of which justices of peace may inquire, and commit till surety found for payment of the forfeiture, the 10th whereof shall go to the justices.

By the *st.* 5 *El.* 21. and 3 *Jac.* 13. none shall kill or chase deer in a park, or inclosed ground, without licence, on pain of treble damages to be assessed by the justices, (or, by the *st.* 7 *Jac.* 13. of 10*l.* at election of the owner,) three months imprisonment, and surety for good behaviour for seven years, which the owner, or justice, on confession, may release.

And if any person not having 40*l.* per annum, nor 200*l.* in goods, nor inclosed ground of 40*s.* per annum for deer, keep dogs, &c. to kill



kill deer, &c. any having 100*l.* *per annum*, may take them for his own use. *Vide post.* (B 48.) [*Vide the st. 7 Jac. 13.*]

So, by the *st. 13 Car. 2.* 10. any convict by confession of one witness before any justice of peace, being prosecuted within six months (or by the *st. 9 Geo. 22.* in three years) of hunting, &c. deer, &c. in park, &c. without consent, or of aiding, &c. forfeits 20*l.* a moiety to the owner, a moiety to the informer, to be levied by distress, &c. and in default to be committed to the house of correction for six months, or to gaol for a year, and find sureties, &c. for another year.

And he who aids by his dogs, &c. will be within the statute, tho' he be not present. *Per three J. Holt. cont. Sal. 542.*

So, by the *st. 5 Geo. 15.* he shall give bond of 50*l.* to be of good behaviour and not offend again. And a park-keeper, &c. convict shall pay 50*l.*

By the *st. 3 & 4 W. & M. 10.* any convict, &c. *ut supra*, being prosecuted in twelve months (or three years by the *st. 9 Geo. 22.*) for hunting in any chase, park, &c. shall forfeit 20*l.*, &c.

If for wounding, taking, killing, 30*l.* for every deer, a third to the informer, a third to the poor, a third to the owner to be levied, &c. *ut supra* by warrant of justices, &c. And he may be detained till the return of the warrant not exceeding two days, and if no distress, shall be imprisoned a year, and pilloried an hour some market day in the next town. (And by the *st. 5 Geo. 28.* he shall be transported for seven years.)

And by the same *st. 3 & 4 W. & M. 10.* a constable by warrant of justices of peace may enter and search, (as in case of stolen goods,) houses of any suspected, and apprehend the person, if he find venison, skins, toils, who shall forfeit 30*l.* to be levied, &c. if he cannot satisfy the justice how he came by or bought them.

And any convict by one witness of pulling down in the night, pales, &c. of a park, chase, &c. shall be imprisoned three months.

And by the *st. 5 Geo. 15.* shall also pay the penalty of killing a deer. The justice of peace ought to make the conviction for an offence against these statutes pursuant to the statutes. 2 *Sho. 489.*

If several are convicted of the same offence, each of them forfeits 30*l.* *R. 1 Sal. 182. 2 Sho. 490.*

If the party has not sufficient distress, the justice ought to make an adjudication, and then determine, that he be committed after two days for the space of six, or twelve months. *R. Carth. 509.*

If the party be absent, he ought to make a warrant to distrain: and if he has no distress, after two days a warrant for commitment. *R. Carth. 509.*

If a Glover has skins found upon him, and says, that *A.* sold them to him; *A.* may be convicted, unless he gives a good account, &c. *R. 1 Sal. 383.*

The conviction ought to shew the offence to be strictly within the statute. 1 *Sal. 378.*

That he had no lands, &c. (where that is a qualification required) at the time of the offence. *R. 3 Mod. 280.*

It ought to shew the day of the fact. *R. 1 Sal. 369. Vide 5 Mod. 447. Vide infra.*

Or,

Or, that he killed three deer between such a day and such a day.

R. 1 Sal. 378. Carth. 502.

That the prosecution was commenced within twelve months, tho' the conviction need not be within that time. R. 1 Sal. 383.

It ought to shew the summons and appearance, or default. Mod. Ca. 41.

And it will be bad, if it shews a summons upon which he appeared Tuesday 7th April, which was impossible, for 7th April was Friday. R. Mod. Ca. 41. 1 Sal. 181.

But the conviction need not recite all the circumstances at large. R. 1 Sal. 369.

If it says, that he unlawfully killed, it is sufficient, without shewing how. R. 1 Sal. 378. Carth. 503.

That it was done *in foresta usitata*; for that imports that it was then used. R. 1 Sal. 377.

*In loco in ambulacro chaseae*; for it imports that it was in the chase. R. 1 Sal. 383.

So, it is not necessary to say *contra pacem*; for it is the suit of the party, not of the king. R. 1 Sal. 378. Carth. 503.

Nor, to shew, whether convicted by evidence, or confession. 5 Mod. 447.

Nor, to shew the oath. R. 1 Sal. 369.

So, a summons is not necessary, if the defendant appears. R. 1 Sal. 383. Carth. 501.

So, it is sufficient to say, *quod convictus est*, without adding *quod ferisfaciet*, &c. for that is only execution and consequence. R. 1 Sal. 378. 383. 2 Mod. Ca. 175.

Nor, is it necessary to shew the day of the fact, if it be within a year. 5 Mod. 446, 447. Vide Sal. 369. Vide *supra*.

Nor, the distribution of the penalty, viz. a third to the poor, &c. R. 1 Sal. 383.

So, a man is not within the statutes if he hunts, &c. where he claims a title. R. 1 Sal. 369.

But that shall not be proved by *affidavit*. where he is convicted. 1 Sal. 369.

If a conviction be affirmed in B. R. execution shall be there by *levari facias*, *feri facias*, or *capias*. 1 Sal. 369. 379.

And if the owner die before execution, upon an *affidavit* and suggestion upon the roll, his executor shall have it. R. 1 Sal. 378.

The process by *levari*, or *feri facias*, out of B. R. shall be to the sheriff, who may thereupon make sale. R. 1 Sal. 379.

But an attachment does not lie for non-payment of the penalty. R. 1 Sal. 369.

If a statute says, a penalty shall be levied by distress, without more, it may be sold. R. 2 Jon. 25. 1 Sal. 379.

[May convict deer-stealer on st. 3 & 4 W. & M. if summoned, tho' he doth not appear. *Rex v. Simpson*, H. 3 Geo. Str. 44.]

[If the justice in the warrant to commit offender for want of distress, on st. 3 & 4 W. & M. says, it has been *certified* to him by the constable that there is not sufficient distress, it is good, without reciting the warrant of distress and the return, for the word *certified* imports it to be in a legal manner. *Rex v. Whitlock*, H. 6 Geo. per Pratt C. J. and Fortescue J. *contra Eyre J.* Str. 263.]

[If

[If conviction is removed by *certiorari* and confirmed, the prosecutor has his election to take execution by a *levari*, or to apply to the justice. *Str.* 263.]

[And if the prosecutor applies to the justice, the warrant of commitment need not set out the confirmation, for the court will take notice of their own records; and the statute here does not give the justice a new jurisdiction, but only revives the old which was suspended by the *certiorari*. *Ibid.* *Per Pratt C. J.* and *Fortescue J.* *contra Eyre J.*]

[If the defendant is convicted on the evidence of the informer, it is bad. *Rex v. Tilly*, *T. 6 Geo. Str.* 613. *Rex v. Stone*, *M. 2 Geo. 2. Ld. Raym.* 1545.]

[If the conviction is only *convictus est*, without *quod forisfaciet*, it will be quashed. *Rex v. Hawks*, *H. 3 Geo. 3. Str.* 858.]

[In conviction for killing deer in a *purlieu*, it cannot be averred that it is a place where deer are usually kept, and need not be averred that the *purlieu* was not the defendant's. *Rex v. Calcutt*, *M. 13 G. 2. Str.* 1119.]

[A man may be convicted on his confession to a witness, who deposes it before the justice. *Rex v. Dore*, *M. 12 Geo. 2. Andr.* 301.]

[He may be convicted on his confession, tho' it does not appear that he confessed killing the same deer which is mentioned in the information. *Ibid.* *sed 2.* for this seems to amount to saying he may be convicted of the fact for which there is no information.]

[By *stat.* 16 *Geo. 3. c.* 30. the former acts relating to deer-stealing are repealed.]

[Every person without owner's consent hunting or attempting to kill or aiding thereto, in a forest, &c. or inclosed ground where deer are usually kept, forfeits 20*l.* every person killing, wounding, taking, or carrying away or aiding therein, 30*l.* for each deer; if the keeper, double; second offence whether the same with the first or any other aforesaid offences, felony.]

[Justice to transmit conviction to quarter session, copy signed by clerk of peace evidence.]

[Justice may grant search-warrant, and if any part of deer, or any slip, noose, toyle, snare, or engine, for unlawful killing found and good account not given, penalty from 30*l.* to 10*l.*]

[If the party cannot be convicted justice may summon every person, through whose hands any part of the deer has passed, and whoever cannot give good account forfeits from 30*l.* to 10*l.*]

[On oath of one witness that any person hath had any part of deer, and shall be reasonably suspected to have come dishonestly or unlawfully thereby, he not giving good account forfeits as before.]

[Person setting net, wire, slip, noose, toyle, or engine, forfeits from 10*l.* to 5*l.* for every subsequent offence from 20*l.* to 10*l.*]

[Pulling down pales or wall, 30*l.*]

[If person carrying fire-arms or sword, *staff*, or other offensive weapon, shall come into any ground inclosed or not inclosed where deer are usually kept, with intent to hunt, take, kill, or take away, the keeper may seize such fire-arms, slips, and engines, (sword, staff, or offensive weapon omitted,) as game-keepers of manors may; beating keeper or his assistant there in execution of office, or attempt-



ing to rescue any person in lawful custody of such keeper or assistant, felony.]

[On information on oath justice (except where summons is specially directed) may issue warrant, &c. where summons is directed, on proof of service personally or at usual abode, and, on non-appearance, to proceed by warrant.]

[Penalties to be recovered before one justice on proof by oath of one witness or confession, half to the king, to be paid for his use into the hands of such person as justice appoints, half to informer, on non-payment (with charges) immediately on conviction, distress, in default imprisonment in common gaol for one year or till sooner payment, (except as excepted.)]

[Offender may be kept in custody three days for return of distress warrant; or if it appears he has not sufficient distress to commit immediately without distress warrant.]

[Offenders for first offence may give two sureties to pay penalty and charges in six days (including day of conviction) on non-payment to commit the party and sureties for the time aforesaid, or sooner payment.]

[Keepers may apprehend on the spot persons hunting, &c. and carry them before justice.]

[Offender in prison for first offence on consent of the prosecutor and owner or keeper may be discharged by quarter-session.]

[Offender discovering other offender so as he be convicted not liable.]

[No *certiorari* unless offender bound with sureties in 100*l.* to prosecutor to pay in thirty days after conviction confirmed or *procedendo* granted, full costs and damages to be ascertained on his oath; and to the justice in 60*l.* to prosecute *certiorari* with effect and pay the forfeiture or surrender in thirty days, in default justice to proceed as if no *certiorari* granted.]

[After conviction confirmed, and the rule of court delivered to the justice he may proceed as if *procedendo* granted.]

[If no *certiorari*, person aggrieved may appeal to quarter-sessions, held twenty days after conviction, giving six days notice to prosecutor, and recognizance to try appeal, &c. at quarter-session next after ten days from conviction, their determination final.]

[Persons having paid the penalty, or imprisoned, may appeal on recognizance, without sureties, penalty remaining in justices hands or person in prison.]

[Proceedings not to be set aside for want of form, but the appeal decided on the merits only. No *certiorari*.]

[Prosecutions in twelve months.]

[By 28 Geo. 2. c. 19. if any person not having a right or legal licence, shall set fire to, burn, or destroy (or be aiding therein) any goss, furze, or fern in any forest or chase, without consent of the owner or person chiefly intrusted with the custody of such forest or chase, or of some part thereof, and being brought before a justice shall be thereof convicted by confession, &c. he shall forfeit not exceeding 5*l.* nor less than 40*s.* half to the informer, and half to the poor, to be levied, &c. *Vide the Statute.*]

(B 48.) *Conies.*] By the *st.* 13 R. 2. 13. none (*ut ante*,) shall keep dogs

dogs or nets, or ferrets, to destroy conies, &c. on pain of a year's imprisonment, (*ut ante*, (B 47.) for deer-stealing.)

By the *st.* 3 *Jac.* 13. none shall kill conies in an inclosed ground without licence, &c. on pain, (*ut ante*, for deer.) And a person having 100*l.* *per annum*, may seize the dog, ferret, net, &c. kept to kill conies by a person not having 40*l.* *per annum*, &c. provided not to extend to chasing in day-time.

By the *st.* 22 & 23 *Car.* 2. 25. any convict, by confession or one witness, within a month before a justice of peace, for chasing or taking any conies in any ground, lawfully used for keeping them, tho' not inclosed, without authority, &c. shall pay treble damage, have imprisonment for three months, and after till they find surety for good abearing.

And any convict, &c. for taking conies in the night on the border of a warren, &c. unless the owner or occupier of the soil, or employed by him, shall pay damage to the party as the justice thinks fit, and to the poor not exceeding 10*s.* and for non-payment shall be committed to the house of correction not above a month.

[A person who has a right of common may kill conies when they are out of the warren and destroy the common; but he cannot have an action on the case against the lord, for that would create a multiplicity of actions. *Cro. El.* 548. *Cro. Jac.* 195. *Cro. Car.* 388.]

[But if the lord has a right to put conies on the common, and by an excess in the number surcharges the common, and by the number of burrows made by the conies the commoner's cattle are prevented from depasturing the common; an action in such a case is the proper remedy, and the tenant may not of his own accord fill up the burrows and remove the nuisance. 1 *Bur.* 252.]

And a lord of a manor, &c. may appoint a game keeper, who may seize dogs, ferrets, &c. for taking conies, &c. (*ut ante*, B 46.) for pheasants.

[By *st.* 5 *Geo.* 3. c. 14. persons entering in the night-time into a warren, or ground used for keeping conies, (tho' not inclosed,) and killing conies, or aiding, may be transported for seven years, or otherwise punished at assises.]

[This extends not to killing conies in the day-time on the coast of *Lincolnshire*.]

(B 49.) *Hares*, &c.] By the *st.* 13 *R.* 2. 13. none not qualified, *ut ante*, shall keep a greyhound, hound, &c. to destroy hares or other gentleman's game, on pain of a year's imprisonment.

By the *st.* 14 *H.* 8. 10. justices of peace at sessions may inquire of those who trace hares in the snow, who shall pay 6*s.* 8*d.* to the king. *Vide Leet*, (L 14.)

By the *st.* 1 *Jac.* 27. any convict, by confession or two witnesses, before two justices of peace, for taking hares by guns, snares, tracing in snow, &c. shall be committed for three months without bail, unless he pay to the poor 20*s.* for every hare, &c. or in a month after commitment shall give surety of 20*l.* to two justices of peace not to offend more.

None shall sell, or buy to sell, any hare, on pain of 10*s.* a moiety to the prosecutor, a moiety to the poor.

And any not having 10*l.* *per annum* inheritance, 30*l.* *per annum* for

for life, 200 *l.* in goods, or the son of an esquire, &c. convict, &c. for keeping a greyhound, &c. to destroy hares, &c. shall be committed, &c. unless he pay 40 *s.* to the poor.

By the *st.* 22 & 23 *Car.* 2. 25. a lord of manor, &c. may appoint game-keepers who may seize greyhounds, &c. used by a person not qualified, (*ut ante*, (B 43.) for shooting,) and may search, (*ut ante*, (B 46.) for pheasants and partridges).

And any convict, by confession, or one witness, in a month, before any justice of peace for setting snares, &c. shall pay to the party what the justice thinks fit, and to the poor not above 10 *s.* and for non-payment be committed not above a month to the house of correction.

By the *st.* 4 & 5 *W. & M.* 23. a constable by warrant, &c. may enter and search houses, &c. of suspected persons unqualified, and if an hare, &c. be found, may carry the offender to a justice of peace, and if he cannot satisfy the justice how he came by it, or produce the seller, or prove the sale, or if, by the same evidence, he be convicted of having or using a greyhound, ferrets, &c. or if the person produced cannot give such evidence to the justice of his innocence, he shall pay (*ut ante*, (B 46.) for pheasants).

The *st.* 4 & 5 *W. & M.* 23. does not alter the manner of conviction for having a greyhound, &c. which was prescribed by the *st.* 22 & 23 *Car.* 2. 25. and therefore the conviction ought to be within a month, and by confession, or one witness. *Per Cur. Trin.* 2 *Ann. B. R.*

By the *st.* 5 *Ann.* 14. (which confirms all the former statutes in *esse*, and is made perpetual by the *st.* 9 *Ann.* 25.) if any, not qualified, keep or use any greyhound, setting dog, &c. to destroy the game, and be convicted by one or two witnesses, before a justice of peace where the offence was committed, he shall forfeit 5 *l.* a moiety to the informer, a moiety to the poor, to be levied by distress and sale by warrant of such justice; or, if no goods, to be sent to the house of correction for three months, and for any subsequent offence for four months.

[It is no objection to an information on this act, that it is not *qui tam*. *Rex v. Lovet*, *H.* 37 *Geo.* 3. 7 *T. R.* 152.]

[On an information, charging the defendant with keeping and using a dog and also a gun on the same day, he can be convicted in only one penalty. *Ibid.*]

So, if he be convicted by his confession. *Per three J.* 2 *Mod. Ca.* 64.

The conviction shall be quashed, if it does not shew that the party was not qualified. *R. Mod. Ca.* 40.

Tho' it says, that he was *persona dissoluta*. *Mod. Ca.* 40.

If there be not proof that the hare, &c. was found upon him *Mo. Ca.* 57.

[A conviction for keeping a gun, on *stat.* 5 *Ann. c.* 14. is ill, and must be quashed. *Rex v. Gardner*, *T.* 11 *Geo.* 2. *Str.* 1098. *Andr.* 255.]

[A gun is not necessarily to be taken to be an engine to kill game; and if on *trover* defendants justify, they must allege and shew the use. *Wingfield v. Stratford*, *H.* 25 *Geo.* 2. 1 *Wils.* 315.]

[In a conviction on this statute, evidence "that the defendant kept



and used a gun to kill and destroy the game," is sufficient, without setting forth the evidence at length. 2 T. R. 18.]

[Hound is not within *stat. 5 Ann. c. 14. Hooker v. Wilkes, H. 13 Geo. 2. Str. 1126.*]

[Conviction for keeping greyhound and killing hares, quashed for not setting forth that the defendant was not qualified, *as he has not 100l. &c.* The defendant appeared.]

[Conviction for keeping a lurcher, good. *Rex v. Filer, H. 8 Geo. Str. 496.*]

[May be on confession. *Rex v. Gage, H. 9 Geo. Str. 546.*]

[If the conviction only avers generally that defendant is not qualified, without averring that he has not the particular qualifications in the statute, it is bad. *Rex v. Hill, H. 12 Geo. 2 Ld. Raym. 1415.*]

The conviction must set out the summons. *Rex v. Hawker, T. 8 Geo. 2. B. R. H. 130.*]

[A conviction is good which lays the offence to be done in a ville, without naming the parish; and if the ville is extraparochial, the informer shall have the whole penalty. *Rex v. Wyatt, P. 13 Geo. Ld. Raym. 1478.*]

If the justice commits the person convicted without endeavouring to levy the penalty by distress, an action for false imprisonment lies. *Hill v. Bateman, T. 12 Geo. Str. 710.*]

[If a game-keeper shoot an unqualified person's dog, who thereupon shoots the game-keeper's, and behaves insolently, the judge will direct very considerable damage. *Per Hardwicke C. Roy v. D. of Beaufort, T. 1741, 2 Atkyns, 190.*]

[A conviction on the 4 & 5 W. & M. is good, without saying the party is a dissolute person, or that he did unlawfully hunt, or that the justice was then a justice. *Rex v. Chipp, T. 12 Geo. Str. 711.*]

[A clothier and alehouse-keeper was found by jury to be an inferior tradesman, within 4 & 5 W. & M. *Wickham v. Walker, M. 11 G. 2. Barnes, 125.*]

[A clothier was determined so to be by B. R. *Bennet v. Thalbois, P. 9 W. 3.* It is said *Holt C. J.* held every tradesman not qualified to be an inferior tradesman. So thought *Bathurst J.* and *Clive J. contra Willes C. J.* and *Noel J. Buxton v. Mingay, T. 30 & 31 Geo. 2. 2 Wilf. 70.*]

[Indictment does not lie for killing hares. *Rex v. Touning, M. 12 Geo. 2. 302.*]

[By *stat. 26 Geo. 2. c. 2.* actions for the recovery of any penalty may be brought before the end of the second term after the offence.]

[By *stat. 28 Geo. 2. c. 12.* every person, qualified or not, who offers game to sale, is liable to the penalties on higlers, &c. offering to sale, by 5 *Ann. c. 14.* And game found in the possession of poulterer, &c. is deemed exposing to sale.]

[By *stat. 10 Geo. 3. c. 18.* person stealing any dog, or receiving it knowing it to be stolen, convicted before two justices, forfeits from 30*l.* to 20*l.* or imprisonment from twelve to six months, and for second offence from 50*l.* to 30*l.* or from eighteen to twelve months imprisonment, and whipping.]

[Justices may grant search-warrant, and if dog or dog-skin found, to restore it, the party knowing it stolen, or the skin to be the skin of a dog stolen, subject to same penalties: appeal final, and no certiorari.]

By]

[By *stat. 13 Geo. 3. c. 80.* person killing hare, pheasant, &c. or using gun, dog, engine, &c. to kill or take, between seven at night and six in the morning, from 12th *October* to 12th *February*, and between nine at night and four in the morning, from 12th *February* to 12th *October*, convicted before one justice, forfeits for first offence from 20*l.* to 10*l.* and for second from 30*l.* to 20*l.* and costs, or for want of distress shall be committed for three months; and for offence after second conviction, shall be committed till quarter session, or give surety to appear to indictment, and if convicted, forfeits 50*l.* and costs, or for want of distress, committed from twelve to six months, and publickly whipt. Half forfeiture to informer, half to poor.]

[Killing or using engine on *Sunday* or *Christmas-Day*, liable to like penalty.]

[Justice where offence committed, may grant warrant, to be indorsed by justice in another county, where offender lives, and the offender thereby be brought before the first justice, or distress made. Appeal, no *certiorari*.]

[By the *st. 8 Geo. 19.* a plaintiff may proceed to recover a pecuniary penalty, by a conviction before a justice of peace, or by action of debt, &c. with double costs, before the end of the next term after the offence.]

#### Highway.

As to highway, *vide Chimin*.

#### Hue and Cry.

As to hue and cry, *vide Hundred*, (C 1, &c.)—*Pleader*, (2 S 1, &c.)

#### (B 50.) Labourers.

(B 50.) *Who are compellable to work.*] By the *st. 5 El. 4.* in hay or harvest-time, any justice of peace, or constable on request, &c. may cause all artificers, meet to labour, to serve by the day for reaping or inning of corn or hay, and on refusal complained of to the constable, &c. he shall set him in the stocks for two days and a night, and for neglect himself shall lose 40*s.* *Vide Apprentices, post.* (B 53, &c.)—*Servants, post.* (B 58, &c.)

Persons accustomed to go into other shires for harvest-work, and having none in their own town or county, may still do so, if not retained in service, and having a testimonial from a justice of peace or mayor, for which they shall give but one penny.

(B 51.) *For what wages.*] Justices of peace, or mayor, by the *st. 5 El. 4.* at *Easter* sessions, &c. may appoint wages of all labourers, artificers, and workmen, by the day, week, month, or year, with meat or without, and by the great, for mowing, reaping, threshing, ditching, &c. by the rod, foot, &c. and certify the same into *Chancery*, &c. or, by the *st. 1 Jac 6.* cause the same ingrossed under their hands and seals to be proclaimed, &c. and if any give more wages, on conviction, before the said justices of peace or head officers, he shall forfeit 5*l.* and be imprisoned ten days without bail: and any

person taking more wages, on conviction before the said justices or two of them, shall be imprisoned twenty-one days without bail. And every promise, gift, &c. contrary, is void.

(B 52.) *Misdemeanor.*] By the *st.* 5 *El.* 4. all labourers, hired by the day or week, betwixt the midst of *March* and *September*, shall continue at work from five in the morning till between seven and eight at night, unless two hours and an half for meals; and from spring of day till night betwixt the midst of *September* and *March*, on pain of 1 *d.* for every hour absent.

And none, retained for any work in the great, shall depart without finishing it, unless for non-payment of hire, for the service of the queen, with licence of the master, or for other lawful cause, on pain of imprisonment for a month without bail, and forfeiture of 5*l.* to be recovered by action of debt in the king's courts of record.

And if a labourer maliciously make an assault or affray on his master, mistress, or dame, or other who hath the charge or oversight of him, on conviction before two justices of peace, or mayor, &c. by confession or two witnesses, he shall suffer imprisonment for a year, or less, at the discretion of the said justices, or mayor, and two others of the corporation: and, if the offence require, shall receive such other open punishment, as the justices of peace at the quarter sessions, or the mayor, and four of the corporation, shall think meet, so as not to extend to life, or limb.

[By 20 *Geo.* 2. *c.* 19. one justice may hear master's complaint of misdemeanors, miscarriage, or ill behaviour of yearly servant in husbandry, or any artificer, handicraft, miner, collier, keelman, pitman, glassman, potter, or other labourer, and punish by commitment to hard labour, not exceeding a month, or by abating wages, or by discharge from service; and so to hear servant's complaint, and discharge him *gratis*.]

[Appeal lies to quarter sessions, which determines finally, with costs to 40*s.* and no *certiorari* lies.]

[By *st.* 31 *Geo.* 2. *c.* 11. this act is extended to servants in husbandry for any time less than a year.]

#### (B 53.) Apprentices.

So, justices of peace have jurisdiction by several statutes for the good order or regulation of apprentices. *Vide Labourers, ante*, (B 50, &c.)—*Servants, post.* (B 58, &c.)

By the *st.* 5 *El.* 4. justices of peace, and mayor, &c. shall meet yearly between *Michaelmas* and *Christmas*, and between *Lady-day* and *Midsummer*, to inquire of and execute all articles of that statute; and shall have 5*s.* *per diem* a-piece for every day (not exceeding three days at a time) whereon they shall meet for such purposes, to be paid out of the forfeitures, &c. in such manner as at quarter sessions: and two justices of peace, (1 *Quor.*) and mayor, &c. may hear and determine all offences, &c. by indictment, &c. at the sessions, and award execution and estreat fines, &c. a moiety whereof shall go to the queen and a moiety to the prosecutor; but, in a corporation, shall go to the corporation, to be levied by a person appointed by the mayor, &c. in such manner as any fines, &c. granted to them by charter.

Tho'



Tho' the statute gives the forfeitures in a borough to the corporation, yet that shall be intended only of the king's moiety, and not the moiety of the informer. *Dub. Mo.* 886. *Hob.* 183. *R. Cro. Car.* 316.

(B 54.) *Who may take them.*] By the *st.* 5 *El.* 4. every householder twenty-four years of age, using an art, mystery, or manual occupation in a city or town corporate, may take as apprentice by indenture for seven years at least, as in the city of *London*, the son of a freeman, not using husbandry, nor being a labourer, but dwelling in the same or other city or corporation, so as his time expire not till his age of twenty-four years: and in a market town may take apprentice, &c. the child of an artificer in the same or other market town, not using husbandry, nor being a labourer.

Provided, a merchant, mercer, draper, goldsmith, ironmonger, embroiderer, or clothier, in a city or corporation, shall not take an apprentice (unless his own son) whose parent hath not 40 *s. per annum* inheritance, or freehold; nor, in a market town, &c. whose parent hath not 3 *l. per annum*, &c. to be certified under the hands and seals of three justices of peace where the estate lies, to the head officer of the city, corporation, or market town, to be inrolled, &c. but twenty-six, viz. a smith, wheelwright, ploughwright, millwright, carpenter, &c. may take an apprentice, tho' the parent hath no lands.

An householder using half a plowland in tillage, may take apprentice any above ten and under eighteen years old, to serve in husbandry till the age of twenty-four, or twenty-one years at least.

And every contract, &c. to take an apprentice contrary to this act, is void; and he who takes, forfeits for every apprentice 10 *l.*

By the *same statute*, a clothmaker, fuller, sherman, weaver, taylor, or shoemaker, having three apprentices, shall keep one journeyman, and for every other apprentice, another journeyman, on pain of 10 *l.*

(B 55.) *Who may be bound apprentices.* By the *parent*, &c.] By the common law, after his full age, a man may bind himself apprentice.

So, he may be bound by his parent before.

So, by the custom of *London*, an infant, after his age of fourteen, and before twenty-one, may bind himself to be apprentice by indenture to a freeman of *London*. *Vide* 21 *Ed.* 4. 6. *a.* if he be not married. 2 *Rol.* 305. *Vide* *Cro. El.* 653.

So, by custom, in other cities, boroughs, &c. 9 *H.* 6. 8. *a.*

And, by the custom of *London*, he shall be bound by his covenant to serve for seven years; and the master shall have such remedy as if he was of full age: and therefore, the master shall have covenant if he depart from his service. *R.* 1 *Mod.* 271. *Semb. Mo.* 125. *Vide* 2 *Keb.* 687.

So, the master may give him correction, or bring him before a justice of peace. *Vide* 21 *Ed.* 4. 6. *a.* 1 *Mod.* 271.

And it is sufficient to say, that by the custom he shall have *tale re-medium*, &c. without saying expressly that he shall have covenant. *R.* 1 *Mod.* 271.

So, now, by the *st.* 5 *El.* 4. an apprentice bound under the age of 21 years to serve, shall be obliged as if of full age.

[An apprentice of 17 years of age and upwards, bound by indenture (which stated her to be 14,) for seven years, is entitled to be discharged at 21. *Ex parte Davis*, B. R. T. 34 *Geo.* 3. 5 *T. R.* 715.]

And covenant lies for not serving. *Adm. Hut.* 63. *R. cont. Cro. Car.* 179. *Vide infra.*

So, covenant lies by the custom of *London*, tho' the indenture be not inrolled pursuant to the custom. *R.* 2 *Rel.* 305. *Pal.* 361.

But by the common law, without special custom, an infant cannot bind himself to be an apprentice. *R.* 21 *Ed.* 4. 6. *a. D.* 2 *Cro.* 494.

[*Qu.* Whether an indenture of apprenticeship made by an infant, being for his benefit, is voidable by him? *Ashcroft v. Burtles*, B. R. *E.* 36 *Geo.* 3. 6 *T. R.* 652.]

[But it is not avoided by the act of his leaving his master's service, and going into another service. *Ibid. Vide Rex v. Hindringham*, H. 36 *Geo.* 3. 6 *T. R.* 557.]

So, tho' bound by a custom, covenant does not lie upon a collateral covenant, tho' usual in an indenture of apprenticeship: as, that he shall not use unlawful games, embezzle the goods of his master, &c. *R. per two J. Winch. cont. Hut.* 63, 64. *Win. Rep.* 64.

So, covenant does not lie for not serving, where an infant binds himself, since the *st.* 5 *El.* 4. *R. Cro. Car.* 179. *Vide supra.*

If the apprentice marry, it is a breach of the covenant, but he shall not be discarded. 2 *Ver.* 492.

So, by the custom of *London*, if the indenture be not inrolled within a year, upon a petition in *French*, to the mayor and aldermen, and a *scire facias* against the master, if the omission of inrollment was not by default of the apprentice, (for it shall not be inrolled if the apprentice does not appear in person,) the apprentice shall be discharged, and may serve another master. *R. Pal.* 361. 2 *Rel.* 305.

None shall be bound apprentice, or discharged without deed, 1 *Sal.* 68.

And the deed ought to be inrolled. 2 *Ver.* 492. 64.

Nor, can he be assigned but by custom. 1 *Sal.* 68.

[An apprentice is not bound to serve the executor of the master. *Baxter v. Burfield*, P. 20 *Geo.* 2. *Str.* 1266.]

[But, if he continue, with his own consent, and that of all other parties, it is a continuation of the apprenticeship. *Doug.* 70.]

So, an apprentice to a waterman, which is a voluntary society, is not within the custom of *London*, and cannot be bound under age. *R. Mod. Ca.* 69.

By the *st.* 5 *El.* 4. if any required to serve in husbandry, or other art, refuse, on complaint to a justice of peace, or mayor, &c. he may send for him, and if he find him meet for that art, may commit him till he will be bound as an apprentice. Provided, none above twenty-one years of age be compelled to be bound.

When a man shall not use a trade, unless he was an apprentice for seven years, *vide in Trade*, (D 5, &c.)

(B 56.) *By the Parish.* By the *st.* 43 *El.* 2. the churchwardens and overseers, with the assent of two justices of peace, (1 *Qu.*) may raise a stock to put out poor children apprentices, and may bind such children

children where they see convenient, till such man child be twenty-four years old, such woman child twenty-one years, or till her marriage.

[A parish indenture of apprenticeship assented to by two justices separately, is void. 3 T. R. 380.]

[And no settlement is gained by serving under it. *Ibid.*]

[If, in the close of the indenture, it be said that the master, at the end of the term, shall give the apprentice two suits of cloaths, this is ill; for the justices can only order him a maintenance as an apprentice; they cannot order him any thing after the term is ended. 1 Sef. Ca. 48.]

[As to the employment of money given to bind out poor apprentices, vide 7 Jac. 1. c. 3.]

And the justices of peace shall compel the master to receive an apprentice in husbandry, tho' not in trade. *Per three J. Holt. cont. Carth. 94. R. 1 Sid. 99.*

[Upon the *st. 5 El. 4.* (*Vide Sal. 67.*)]

[And a person occupying lands within a parish, is compellable to receive a parish apprentice, tho' he do not reside within that parish. 3 T. R. 107.]

[So, tho' it be enacted by 20 Geo. 3. c. 36. relative to the binding of poor apprentices within particular incorporated districts, that no person shall be bound to receive any such apprentice, unless he be an inhabitant and occupier in the parish where such child lives, it is not necessary that the master should actually reside in the parish; if he be an occupier there it is sufficient: inhabitant and occupier are to this purpose synonymous terms. *Id. 523.*]

[Where several persons hold land in partnership, some of whom actually reside on it, and others reside at a distance in another parish, the latter as well as the former are bound to take apprentices, if in other respects they are fit persons to take them. *Rex v. Barwick, M. 37 Geo. 3. 7 T. R. 33.*]

By the *st. 3 Car. 4.* all to whom the overseers shall bind any children apprentices, may receive and keep them as such, and were compellable to receive them. *Per three J. 1 Lev. 84. 3 Mod. 270. R. 1 Sal. 67. Sho. 77.*

By the *st. 8 & 9 W. 3. 30.* any person to whom a poor child is appointed to be bound, pursuant to the *st. 43 El. 2.* refusing to receive and provide for it, and execute a counterpart of the indenture, shall, on conviction before two justices of peace by oath of one churchwarden or overseer, forfeit 10*l.* to be levied by distress and sale, &c. to the use of the poor: saving an appeal to the next quarter sessions.

If the sessions upon appeal disallow the order, because the master is a merchant; it will be good: for they are the judges who are proper. *R. Sal. 491. vid. acc. Bott. 389. Loft. 79.*

[A poor child may be bound by the parish officers to a person residing in another parish. *Rex v. St. Margaret's, Lincoln, H. 13 G. 3. S. C. 226.*]

[If a poor boy be bound apprentice by the parish officers with the consent of two justices of the county to a master residing in a different parish and county, and all the parties, except the apprentice, sign the indenture, the apprentice will gain a settlement in the parish of



the master, by residing there 40 days under the indenture. *Rex v. Nottingham, M. 29 Geo. 3. 2 T. R. 726.*]

[By *st. 18 Geo. 3. c. 47.* boys shall be bound apprentices by the parish, only till twenty-one years of age.]

[As to binding poor apprentices to the sea services, *vide 2 & 3 Ann. c. 6. 12 Geo. 2. c. 17.*]

(B 57.) *How punished, or discharged.*] By the *st. 5 El. 4.* if the master misuse, or give cause of complaint to the apprentice, or he do not his duty to his master, a justice of peace, or mayor, may take order between them as equity requires: and if, for want of conformity in the master, the justice of peace or mayor cannot compound the matter, he may bind the master to the next quarter sessions of the county or corporation, where, if they think meet, four justices of peace, (1 *Qu.*) or mayor, with three of his brethren, may under hand and seal to be inrolled, &c. declare the apprentice discharged, and the cause thereof: and if fault be in the apprentice, such justices, or mayor, with his assistants, may order such correction as they think meet.

Tho' the statute says (*for want of conformity in the master, &c.*) yet the justices at quarter sessions may discharge an apprentice upon his complaint, as well as upon complaint of the master. *R. 1 Sand. 315. 1 Sal. 67.*

And the parties may come originally to the sessions, without coming first to a justice of peace, or mayor. *Dub. 1. Saund. 316. Per two J. Holt. cont. 1 Sal. 67. R. Sal. 68. 491. Carth. 198. cont.*

[Sessions have original jurisdiction to discharge apprentices. *Rex v. Davie, T. 12 Geo. Str. 704. Rex v. Heafeman, B. R. H. 101.*]

[It must appear on an original order of sessions to discharge an apprentice, that the master was present, or summoned. *Rex v. Eastman, P. 8 Geo. Str. 1013, B. R. H. 101.*]

[Using him unkindly, and refusing to provide for and entertain him, is not sufficient ground; there is a power to oblige the master to entertain him; and using unkindly is too loose. *Ibid.*]

[Cannot discharge the master from his apprentice for the apprentice's incurable sickness; the master is to provide for him in sickness and in health. *Rex v. Hales Owen, T. 4 Geo. Str. 99.*]

[Apprentice shall not be discharged, only because his master declares he will not take him again. *Rex v. Davie, T. 12 Geo. Str. 704.*]

If the master license a servant to depart, he cannot afterwards revoke it. *R. Mod. Ca. 70.*

The justices of peace may discharge an apprentice, tho' the master does not appear, by which his recognisance is forfeited. *R. Sal. 67. 490.*

If the apprentice be discharged, the master shall be discharged of course. *R. Sal. 471.*

If the justices discharge the apprentice, the covenants are discharged of course. *5 Mod. 140.*

If the justices discharge the apprenticeship, they may order restitution of the money as consequent. *R. P. 13 W. 3. Sal. 67, 68. 490. [Contra Str. 69.]*

[But the point seems now established that they may. *1 Atk. 149.*]

But

But the justices cannot discharge an apprentice to a trade, not expressed in the statute. *R. 5 Mod. 140. R. Sal. 471. 490. [2 Ld. Raym. 1410. 1 Str. 663. contra.]*

They cannot order an executor to maintain the apprentice, where the master dies. *R. Sb. 405. 1 Sal. 66.*

They cannot discharge, unless it be by order under the seals of the justices. *R. Carth. 198.*

Yet *quoad* his maintenance, the covenant is not discharged by the death of the master. *Semb. 1 Sal. 66.*

[The justices have a concurrent jurisdiction with the mayor's court over apprentices to freemen of London, bound and inrolled there but living in another county. *Rex v. Collingbourn, M. 12 Geo. Str. 663. 2 Ld. Raym. 1410.*]

[By *st. 20 Geo. 2. c. 19.* on complaint of a parish apprentice, or one with whom not more than 5*l.* was paid, two justices may summon master and discharge apprentice, without fee.]

[So, on complaint of master, they may commit apprentice to hard labour for a month, or discharge him.]

[By *st. 6 Geo. 3. c. 25.* if apprentice absents himself from service before time expired, he shall serve for so long time as he has absented himself, or make satisfaction, or be committed to the house of correction for three months: this extends not to apprentices giving more than 10*l.* or after seven years elapsed beyond their term.]

#### (B 58.) Servants.

(B 58.) *Retainer.*] But the *st. 5 El. 4.* every retainer contrary to that statute is void. And every servant retained in husbandry, or any of the thirty arts there mentioned, shall at his departure have a testimonial under the seal of the corporation, or of the constable and two other householders of the parish, declaring the place of his last service and lawful departure; and if retained again, without shewing such testimonial to the head officer of the parish, he shall be imprisoned till he procure one, and if not procured in 21 days, be whipped as a vagabond; and any, retaining such servant without shewing such testimonial, shall forfeit 5*l.* *Vide Labourers, ante, (B 50, &c.)—Apprentices, (B 53, &c.)*

If a man retain another generally, it shall be intended for a year. *F. B. N. 168. H. Co. L. 42. b.*

If he retain another for 40 days, another may retain the same person; for the first retainer was not according to the statute. *F. N. B. 168. F.*

If a man retain another *juxta formam statuti* without mention of wages, the retainer is good, and he shall have the wages, which are limited by the justices pursuant to the statute. *Semb. Bro. Labourer, 1.*

So, if a man retain a servant, without saying for what office, it is good. *Dalt. 185.*

So, a retainer conditionally is good. *Semb. Bro. Labourer, 23. Dalt. 185.*

So, a retainer for two or three years. *F. N. B. 168. K.*

But a retainer by an insufficient man is void. *Semb. Bro. Labourer, 25. F. N. B. 168. H.*

A retainer to serve when required, is good only upon covenant. *F. N. B. 168. F.*

By

By a retainer a man is in service by law, tho' he does not actually come to his service. *Awarded, Bro. Labourer, 9. 11.*

(B 59.) *For what time.*] By the *st. 5 El. 4.* none shall be retained in any of the sciences of clothier, clothweaver, tucker, fuller, cloth-worker, sherman, dyer, hosier, taylor, shoemaker, tanner, pewterer, baker, brewer, glover, cutler, smith, farrier, currier, fadler, spurrier, turner, capper, hat or feltmaker, bowyer, fletcher, arrow-head-maker, butcher, cook or miller, for less time than a year.

A retainer generally shall be intended for a year, for that is pursuant to the statute. *F. N. B. 168. H. Co. L. 42. b.*

Yet a man may retain another for two or three years. *F. N. B. 168. K.*

Or, for life; but such retainer is out of the statute. *Bro. Labourer, 44.*

(B 60.) *For what wages.*] By the *st. 5 El. 4.* justices of peace, or mayor, &c. at *Easter* sessions, or in six weeks after *Easter*, on pain of 10 *l.* a-piece, (unless out of the county or absent by sickness, &c.) shall appoint the wages of any servant whose wages by any law in time past have been rated by the year, &c. and before the 12th of *July* certify the same with the causes thereof into *Chancery*, whereupon proclamations may issue for the observance, &c. which shall be recorded, &c. and proclaimed and posted on market day before *Michaelmas*. But the justices may certify the continuance of the last year's wages, and then the first proclamation shall be in force till a new proclamation for new rates be sent down.

And if any person, after such proclamation published, shall give more wages, on conviction before the said justices of peace or head officers, he shall forfeit 5 *l.* and be imprisoned ten days, without bail: and any person taking more wages, on conviction before the said justices, or two of them, shall be imprisoned twenty-one days, without bail.

By the *st. 1 Jac. 6.* the wages, being rated and ingrossed under hands and seals of those who rated them, need not be certified into *Chancery*, but the sheriff or mayor, &c. may cause proclamation of them in as many places as they think convenient, which every one shall be bound to observe, as if the proclamation had been sent down after a certificate, &c.

But the *st. 5 El.* does not extend to wages of a coachman, or other servant, not retained in husbandry. *R. 2 Jon. 47. R. Sal. 442. Mod. Ca. 204. Vide infra.*

And justices of peace cannot imprison for non-payment of wages, without an indictment. *5 Mod. 419.*

Yet for wages in husbandry, settled by the sessions, the justices have taken upon them, and are allowed to order the payment. *Sal. 441.*

And if it appears that they are wages in husbandry, tho' not what are settled, it is sufficient, if nothing appears to the contrary. *Per two J. Sal. 441. Semb. Sal. 442.*

So, it shall be intended wages in husbandry, unless the contrary appears. *R. Sal. 484.*

But justices of peace have no authority to make an order for servants



vants' wages, except where the party is retained in husbandry for a year, according to the *st. 5 El. 4. R. Carth. 156.*

[Justices have only jurisdiction in husbandry; order ought to shew it was a matter within their jurisdiction; indictment quashed for want of it. *Per Parker Ch. J. and Pratt J. contra Eyre J. Rex v. Helling, Str. 8. Salk. 441. 484. contra.*]

[Order for wages in husbandry good, tho' it does not appear that the master was present, nor how long the service was, nor what wages *per annum.* *Atkyns's Case, H. 5 G. Fort. 318.*]

[Justice may order payment of wages. *Per Cur. Shergold v. Holloway, M. 8 G. 2. Str. 1002.*]

[But he cannot grant a warrant to apprehend the party, only a summons. *Ibid.*]

[By *st. 20 G. 2. c. 19.* one justice may determine disputes between masters and yearly servants in husbandry, and between masters and any artificer, handicraft, miner, collier, keelman, pitman, glassman, potter, and other labourer, tho' no rate of wages is settled, and may order payment not exceeding 10*l.* to servant, and 5*l.* to artificer, and on non-payment for twenty-one days, distress.]

(B 61.) *Who are compellable to serve.*] By the *st. 5 El. 4.* every person unmarried, or under thirty years of age, brought up in any of the said thirty trades, and not allowed under the hands and seals of two justices of peace, or mayor and two aldermen, to have 40*s.* *per annum*, or 10*l.* value in goods, nor being otherwise retained, nor having any farm or tillage, on request by any using the trade he was brought up in, shall not refuse to serve for the wages limited, &c. on pain as for departing from service. *Vide post. (B 63.)*

And persons, between the age of twelve and sixty, not being an apprentice or otherwise retained, nor a gentleman born, nor a scholar in an university or school, who hath not 40*s.* *per annum*, nor 10*l.* in goods, nor a parent living worth 10*l.* *per annum*, or 40*l.* in goods, nor any farm, on request, &c. shall be compelled to serve in husbandry for a year, at the set wages, on the like pain.

And two justices of peace, or mayor and two aldermen, may appoint a woman, between the age of twelve and forty, unmarried, and out of service, to serve by the year, week, or day, for such wages and in such manner as they think meet, and on refusal, &c. may commit her to ward, till she shall be bound to serve.

Gentlemen, &c. who cannot be compelled to serve, if they covenant to serve, are bound by it; and an action lies for breach of covenant. *F. N. B. 168. E.*

(B 62.) *Misdemeanor in service.*] By the *st. 5 El. 4.* if a servant maliciously assault or make affray on his master, mistress, or dame, or other who hath the charge or oversight of him, on conviction before two justices of peace, or mayor, &c. by confession or two witnesses, he shall suffer imprisonment for a year or less, at the discretion of the said justices, or mayor and two others of the corporation; and, if the offence require, shall receive such other open punishment as the justices at quarter sessions, or mayor and four of the corporation shall think meet, so as not to extend to life or limb.

If

If a servant promise or covenant to serve, and do not serve, he shall suffer as for departing from service.

[With respect to servants setting fire to dwelling houses or out-houses, see *ft. 6 Ann. c. 31. f. 3.* and *14 Geo. 3. c. 78. f. 84.*]

(B 63.) *Departure from service.*] By the *ft. 5 El. 4.* none shall put away a servant, or depart from service before the end of his term, unless for cause to be allowed by a justice of peace, or mayor, &c. and none shall put away a servant, or depart from service at the end of his term, without a quarter's warning before, on pain that the master forfeit 40 s. unless he prove sufficient cause for such putting away, before justices of *oyer and terminer*, of assize, or of the peace, at quarter sessions, or before mayor and two aldermen of a corporation; and the servant, if found faulty on proofs, and examination before two justices of peace, or mayor and two aldermen, shall be committed without bail, till bound to continue in the service, and then delivered without fee to the gaoler. And if a servant depart into another shire, the justices of the peace of the county or corporation may grant a *capias* to the sheriff, or head officer of the place where such servant is returnable before them when they please, so as they commit the servant come by such process, till he find surety honestly to serve, &c. *vide ft. 24 G. 2. c. 55.*

[The discharge of a servant by a justice is an act of jurisdiction, and should be by order in writing. *Rex v. Hanbury, T. 26 & 27 G. 2. B. S. C. No. 115.*]

[It was holden that an order for discharging a servant from her master's service under this statute was void, (and not merely voidable,) because it did not appear on the order itself that she was a *servant in husbandry*. *Rex v. Hulcott, H. 36 Geo. 3. 6 T. R. 583.*]

[There must be a hearing, and ordering, (in writing,) and a reasonable cause. *B. S. C. No. 115.*]

[*Qu.* Whether the insanity of a servant be a good cause of discharge? *Rex v. Hulcott, H. 36 Geo. 3. 6 T. R. 583.*]

[A servant's marrying is no reasonable cause for discharge; for it is not a misdemeanor; and nothing else is a cause. *B. S. C. No. 115.*]

None shall depart, and be retained again, without a testimonial, &c. *Vide Retainer, ante, (B 58.)*

If a servant depart from his service, he shall lose his whole wages. *Bro. Labourer, 40.*

But if he depart with the consent of his master, he shall have his wages for the time he served. *Ibid. 38.*

Before the *ft. 5 El.* a denial of wages, meat or drink, was cause for a servant to depart from service. *F. N. B. 168. L.*

So, a battery. *F. N. B. 168. L. 2.*

Or, licence of the master. *F. N. B. 168. L.*

But marriage was not, and the husband could not take the wife out of service. *Bro. Labourer, 18. F. N. B. 168. N.*

If a servant be drawn away, the master may re-apprehend him, and keep him in spite of him. *F. N. B. 168. P.*

[And trespass on the case will lie for enticing away a journeyman, who works by the day or piece, before his work is finished. *Hart v. Aldridge, B. R. E. 14 Geo. 3. Cowp. 54.*]

[With

[With respect to disputes between silk masters and their workmen, *vide* *stat.* 13 & 14 *Car.* 2. c. 15. 20 *Car.* 2. c. 6. 8 & 9 *W.* 3. c. 36. 22 *G.* 3. c. 40. 13 *G.* 3. c. 68.]

[As to disputes between clothiers and their workmen, *vide* 4 *Ed.* 4. c. 1. 7 *Jac.* c. 7. 10 *Ann.* c. 16. 1 *G.* 2. c. 15. 13 *G.* c. 23. 29 *G.* 2. c. 33. 30 *G.* 2. c. 12. 14 *G.* 3. c. 25.]

[As to disputes between masters and their servants in the woollen, linen, fustian, cotton, and iron manufactures, *vide* 1 *An.* 2. c. 18. 13 *G.* 2. c. 8.]

[In the leather manufactures, *vide* 13 *G.* 2. c. 8.]

[In the making of hats, or in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, or silk manufactures, *vide* 22 *G.* 2. c. 27. 17 *Geo.* 3. c. 56. 14 *G.* 3. c. 44.]

[In the bone and thread lace manufactory, *vide* 19 *G.* 3. c. 49.]

[In the manufacture of clocks and watches, *vide* 27 *G.* 2. c. 7.]

[In husbandry, and with respect to artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glasmens, potters, and other labourers, *vide* 20 *G.* 2. c. 19. 31 *G.* 2. c. 11. 6 *G.* 3. c. 25.]

[Between ship masters and their seamen, *vide* 2 *G.* 2. c. 36.]

[Tailors and their workmen, within the bills of mortality, *vide* 7 *G.* 2. c. 13. 8 *G.* 3. c. 17.]

[Shoe-makers and their workmen within the bills, *vide* 9 *G.* c. 27.]

#### (B 64.) Poor.

(B 64.) *Overseers of the poor. Who are.* By the *stat.* 43 *El.* 2. the church wardens, and four, three, or two substantial householders to be nominated in *Easter* week, or a month after, under the hands and seals of two or more justices of peace (1 *quorum*) in or near the parish, shall be called overseers of the poor.

An appointment on a *Sunday* is bad. *Cowp.* 139.]

[An appointment of overseers by two justices *separately*, is bad; for where magistrates are to execute a judicial act, they must meet and execute it together. 3 *T. R.* 38.]

[An usage, for the parishioners to meet and elect persons to be returned to the justices as overseers, is against the statute, and the justices may appoint others than those returned. *Ibid.*]

[Not only the persons appointed overseers, but any other parishioners may appeal to the session against the appointment. *Ibid.*]

And if no such nomination, every justice in the division, and every mayor, alderman, and head officer shall forfeit 5 *l.* for the relief of the poor, to be levied by warrant from the quarter sessions.

[No parol evidence shall be admitted of their being overseers; the appointment under the hands and seals of two justices must be produced. *Rex v. Arnold*, *T.* 4 *G.* *Str.* 101.]

[They must be appointed by the word *overseers*. *Rex v. St. George's*, *T.* 9 *Geo.* *Fort.* 320.]

[Justices may and must appoint overseers in an *extra-parochial* place. *Rex v. Rufford*, *H.* 8 *G.* *Fort.* 321. *Str.* 512.]

[It must appear on the order appointing overseer, that he is a substantial householder. *Rex v. Sheringbrook*, *P.* 11 *G.* 2 *Ld. Raym.* 1394.]

[An order of justices which appointed *A.* "being a substantial householder of the parish of *B.* to be overseer of the poor for the hamlet



hamlet of C. i n the said parish" was confirmed generally by the sessions with costs; and both those orders were affirmed in the court of B. R. *Rex v. Morris*, H. 32 Geo. 3. 4 T. R. 550.]

[Overseers may be appointed at any time. *Rex v. Rufford*, T. 7 G. *Rex v. Utoxeter*, T. 5 G. 2. *Rex v. Sparrow*, H. 13 G. 2. Str. 1123. 2 T. R. 395. 406.]

[In the appointment they must be stiled *substantial housekeepers there, or in the said parish*, and that in the body of the appointment. *Weobly's Case*, M. 20 G. 2. Str. 1261. 4 T. R. 550.]

[But the word *substantial*, as applied to overseers, must be understood relatively. 2 T. R. 395. 406.]

[Therefore if a district contain only three houses, the inhabitants of all three may be appointed overseers, notwithstanding two of them are labourers and poor. *Ibid.*]

[If there is an order appointing *one* overseer, B. R. will not quash it, for they may appoint one at a time, and may have appointed another, and the court will not presume the contrary. *Rex v. Bessland*, H. 19 G. 2. Wilf. 128.]

[Whether the offices of justice of peace and overseer are incompatible, and whether overseer can appoint a deputy, 2. *Rex v. Gayer*, H. 30 G. 2. 1 B. M. 245.]

[It seems than an overseer may appoint a deputy. 2 T. R. 395.]

[Justices cannot appoint more than four overseers; if they do, one may be left out of the order by *consent*, otherwise the order must be quashed. *Rex v. Loxdale*, H. 31 G. 2. 1 B. M. 445.]

[An order made at *Easter* 1766, appointing overseers for this present year 1766, is good; for it shall be understood from *Easter* 1766 to *Easter* 1767. *Rex v. Helling*, P. 6 G. 3. 3 B. M. 1904.]

But a citizen and inhabitant of *London*, who resides for part of the year in the country, ought not to be chosen there. *Carth.* 161.

[A woman may be appointed an overseer. 2 T. R. 395. 406.]

(B 65.) *Their authority in relief of the poor.*] By the st. 43 El. 2. the overseers, or the greater part, shall take order, with consent of two such justices of peace for setting to work the children of all parents they think unable to maintain them, and all persons having no means or trade to get their living by.

And to raise weekly, or otherwise, by taxation of inhabitant, parson, vicar, &c. occupier of lands, houses, tythes, coal-mines, &c. a stock for setting the poor to work, relief of the impotent, and putting out apprentices, &c.

And by warrant of two such justices to the present or subsequent overseers, to levy such tax by distress and sale of the offender's goods, and in defect of distress, such two justices may commit to the county gaol without bail, till payment.

[The granting of such warrant by the magistrates is a judicial and not a ministerial act; and they ought first to summon the party, and hear what he has to say in his defence. *Harper v. Carr*, B. R. E. 37 Geo. 3. 7 T. R. 270.]

And shall meet once a month in the church, after afternoon service, (unless by excuse allowed by two justices,) to take course in the premises.

And in four days after the year others nominated, shall account for

for all monies received or assessed, and their stock, and deliver what is in hand to the new overseers, on pain of 20*s.* if negligent in office, or the orders aforesaid made with assent of two justices.

[Their accounts should be settled at the end of the year; and if a person be appointed an overseer for four successive years, and do not make any rate in the three first to reimburse himself what he expended in those years, he cannot in the fourth year make a rate for that purpose. *Rex v. Goodcheap*, *H. 35 Geo. 3. 6 T. R. 159.*]

And the monies or stock behind on such account may be levied by distress and sale, &c. And two justices may commit the churchwarden or overseer refusing to account, till he account and pay what is due on such account.

Provided, if any be aggrieved, &c. the justices of peace at the quarter sessions may make a final order.

And the head officers of a corporation, being justices of peace, shall have in and out of sessions the authority of justices in the county.

[But a specific sum of money received by an overseer of the poor is not such a debt as can be proved under a commission of bankrupt against him, before his accounts are delivered in. *1 T. R. 369.*]

[If there are four justices in a liberty, and they have been used to determine appeals concerning the poor, they may do it. *Rex v. Coningsby*, *H. 18 G. 2. Str. 1222.*]

[Quarter sessions have not original jurisdiction over overseers' accounts, and therefore on an order of sessions relating to them, it must appear that they have been allowed by two justices, *quorum unus*. *Rex v. Bartlett*, *T. 7 G. 2. Str. 983. Vide 1 Bl. Rep. 395.*]

[This continues the same since *17 G. 2. c. 38.* and therefore sessions cannot make an original order on old overseers to pay to the new balance of their accounts, settled and balanced by the said order of sessions. *Rex v. Whitear*, *M. 3 G. 3. 3 B. M. 1365.*]

[The vestry cannot authorise old overseers to retain balance of their accounts. *Rex v. Justices of Somersetshire*, *M. 8 G. 2. Str. 992.*]

[Beasts of the plough may be distrained, tho' there is other sufficient distress. *Hutchins v. Chambers*, *P. 31 G. 2. 1 B. M. 579.*]

[If sufficient distress might be taken at the first, but is not, the officer may distrain again under the same warrant, provided it be for the same sum due; but a man who has an entire duty shall not split the entire sum, and distrain for one part at one time, and another at another. *Ibid.*]

[If a man rated dies before payment, and a demand is made on his representative, and he is summoned, distress may be granted. *Semb.*

But certainly not otherwise. *Stevens v. Evans*, *P. 1 G. 3. 2 B. M. 1152.*]

[The expences of distress and sale may be retained tho' *43 El.* does not mention it; the statute giving a right to distrain and sell, all incidents necessary to obtain that right are included. *Moyse v. Cockledge*, *C. P. H. 22 G. 2. Willes, 636. Barnes, 459. S. C.*]

If an overseer be in arrear upon an account, he shall not be committed but upon default of a distress. *R. Sal. 533.*

Tho' it be by the quarter sessions. *Ibid.*

If he be in arrear upon an account, the justices may order payment to the successor. *R. Sal. 484.*

But

But a *mandamus* to account to the successor will be quashed; for he ought to account to the justices. *R. Sal.* 525.

So, a *mandamus* for a rate for reimbursement of the predecessor. *R. Sal.* 531. [2 *Ld. Raym.* 1009. *S. C.* See 6 *Mod.* 97.]

If an overseer gives a general account, he cannot be committed for not giving a particular account. *R. Sho.* 395.

[If justices refuse to swear overseer to his accounts, *mandamus* lies of course; and they may return the special cause. *Rex v. Justices of Middlesex, Hil.* 19 *Geo.* 2. *Wilf.* 125.]

[So, if on an appeal against overseers' accounts the sessions disallow some of the items, and do not order the overseers to pay the balance to the successors; two justices out of sessions may enforce payment of the balance; and if they refuse to interfere, the court of *B. R.* will grant a *mandamus* to compel them to hear the complaint. *Rex v. Carter, E.* 31 *Geo.* 3. 4 *T. R.* 246.]

By the *st.* 43 *El.* 2. the churchwardens and overseers, with agreement of the lord of the manor and order of quarter-sessions, may build houses on the waste, for the impotent poor, and no other, to dwell in.

[On this statute a rate cannot be made for repairing or re-building a work-house, nor to reimburse an overseer for money advanced for that purpose on account of the parish. *Doug.* 116.]

[By 9 *Geo. c.* 7. *f.* 4. the churchwardens and overseers, with the consent of the major part of the parishioners assembled in vestry or other public meeting for that purpose, are enabled to hire any house, or to contract with any person for the lodging, &c. of the poor.]

[On this statute it is not necessary that *all* the churchwardens and overseers should concur; the contract of the majority will bind the rest. 3 *T. R.* 592.]

Overseers ought to relieve impotent persons only. 2 *Bul.* 348.

By the *st.* 3 *Car.* 4. churchwardens and overseers with assent of two justices of peace, (1 *quorum*,) or of one, if no more in that division, may set up and use any trade, &c. for setting on work, and relief of the poor of that parish.

By the *st.* 3 & 4 *W. & M.* 11. a register shall be kept, at the charge of the parish, of all relieved, and when first, and for what cause, which at *Easter*, or oftner, shall be examined, &c. And none relieved unless registered, or by order of quarter sessions, or under the hand of a justice of peace, or in case of small pox, plague, or pestilential diseases. Or, by *st.* 9 *Geo.* 7. upon sudden occasions.

So, by the *st.* 8 & 9 *W.* 3. 30. a poor person, his wife and children in the same house, (unless there to nurse an impotent parent,) shall wear a P. with the first letter of the parish in blue or red cloth on the right shoulder of the upper garment; and for neglect the justices of peace may abridge or take away the relief, or send to the house of correction for twenty-one days; and no other shall be relieved on pain of 20s. to be levied by the justices, on conviction by one witness, by distress and sale, a moiety to the poor, a moiety to the informer.

By the *st.* 9 *Geo.* 7. justices shall not order relief, till oath of a reasonable cause for it, and of refusal by the vestry, &c. And till hearing overseers, or summons of them, and their default to appear.

[Where an allowance is ordered to be made weekly to a pauper, it is due at the beginning of the week. *Rex v. Fearnley, T.* 26 *Geo.* 3. 4 *T. R.* 316.]

[When



[When relief is granted to a poor person, only such person (and not any of the rest of the family) is obliged to go into the work-house under this statute. *Rex v. Haigh, E. 30 Geo. 3. 3 T. R. 637. Vide Rex v. North-Shields, H. 20 Geo. 3. Dougl. 331.*]

[By *stat. 17 Geo. 2. c. 3.* the overseers shall give notice in church of the rate, next Sunday after allowed by the justices, or it is void. *2 T. R. 664.*]

[If a poor-rate be not published in the church on the Sunday next after it is allowed, it is a nullity, and payment under it cannot be enforced, tho' there be no appeal to the sessions. *Rex v. Newcomb, T. 31 Geo. 3. 4 T. R. 368.*]

[*stat. 2.* the rates may be inspected by any inhabitant, paying 1*s.* and a copy shall be given for 6*d.* for every twenty-four names, on penalty of 20*s.*]

[By *stat. 17 Geo. 2. c. 38.* in fourteen days after appointment of overseers, the churchwardens and former overseers shall deliver them an account in writing, in a book signed by them of all monies received by them, or rated not received, and of all stock in hand, and all monies paid, and all other things concerning their office, and deliver them all money and stock: the account to be sworn to before a justice, and attested at the foot of it, and kept for inspection for 6*d.* and copies given at 6*d.* for three hundred words.]

[By *stat. 2.* officer not accounting and delivering money, &c. to be committed by two justices till he does.]

[By *stat. 3.* overseer removing, shall on like penalty account and deliver; dying, his executor shall account and pay in forty days; and on death, removal, or insolvency, two justices shall appoint another.]

[By *stat. 4.* persons aggrieved may appeal to quarter-sessions on reasonable notice, who are to determine finally; if not reasonable notice, to adjourn to next quarter-sessions, and then determine finally; and may give costs. *1 T. R. 625. 2 T. R. 623.*]

[An appeal against a poor-rate must be lodged at the sessions next after the allowance of it. *Rex v. Atkins, M. 31 Geo. 3. 4 T. R. 12.*]

[By *stat. 5.* in corporations where there are not four justices, the appeal to be to county quarter-sessions.]

[By *stat. 6.* quarter-sessions shall only amend rate, so as to give relief; if necessary to quash the whole rate, they shall order a new one to be made by churchwardens and overseers.]

[By *stat. 7.* rate may be raised by distress not only in the parish, but in any other in the county; and for want of it there, in any other county, by warrant of justice of that other county; appeal to be to the quarter-sessions where the parish lies.]

[By *stat. 8, 9, 10.* distress not to be unlawful for want of form in appointment, rate, or warrant, or party distraining deemed a trespasser *ab initio* for subsequent irregularity; and party suing shall recover special damages only and costs, but shall not recover if tender made before action brought.]

[By *stat. 11.* if any person neglects to pay, the succeeding overseers shall levy such arrears, and reimburse their predecessors what they have expended and are allowed in their accounts.]

[By *stat. 12.* persons removing from, or coming into a parish, shall pay in proportion to the time; to be settled by two justices.]

[By *ff.* 13. copies of the rates shall be entred in a book, in fourteen days after appeals determined, and signed by churchwardens and overseers: and all persons rateable may inspect them.]

[By *ff.* 14. officer offending shall forfeit from 10*s.* to 5*l.* for the use of the poor.]

[By *ff.* 15. where there is no churchwarden, the overseers shall do all acts, and be liable to all penalties, by virtue of this and all former statutes concerning the poor.]

Generally the justices ought to determine who are impotent. 1 *Vent.* 69.

An order for relief shall not be quashed, tho' the party be able to work. *Ibid.*

Tho' the party be a bastard; for such an one may be relieved as impotent. 1 *Sal.* 123.

Yet the order for relief must say, that the party is poor and impotent, otherwise it will be quashed. *R.* 5 *Mod.* 397.

[In an order for relief, it must appear that the party is poor and impotent; the word *impotent*, indispenfible; three orders quashed for want of it. *Rex v. Highworth, Rex v. Stoke-Ursey, Rex v. Tipper, Str.* 10.]

And justices cannot order the finding of an house for the poor. 5 *Mod.* 397.

[No appeal lies from an order for the relief of a pauper. *Rex v. North-Shields, H.* 20 *Geo.* 3. *Dougl.* 331.]

(B 66.) *In charging the parish.*] Every parish ought to be charged for the relief of their own poor.

So, a parish in reputation, which in the 43 *El.* and ever since had churchwardens, &c. *Per two J. Houghton cont.* 2 *Rol.* 160. *R. Cro. Car.* 93. 395. *Jon.* 356.

[The parish to which the principal militia man belongs is liable to reimburse the parish of the substitute the expences of maintaining the substitute's family, tho' the substitute had more than one child when he was approved by the deputy lieutenants and inrolled. *Rex v. Willis, H.* 35 *Geo.* 3. 6 *T. R.* 179.]

[An order for reimbursement under the *stat.* 33 *Geo.* 3. c. 8. f. 3. made upon the parish for which a substitute in the militia serves, to indemnify the parish in which such substitute's family shall have become chargeable and been relieved under an order of maintenance, must be made by the same magistrate, and at the same time as the first order of maintenance; and notice of such order of reimbursement ought to be served on the parish to be affected by it, before they can be proceeded against criminally for disobedience to it. *Rex v. Ledbury, E.* 38 *Geo.* 3. 7 *T. R.* 558.]

*Semble*, that if the substitute be sworn and actually serve, his family are entitled to be relieved within the meaning of the *stat.* 26 *Geo.* 3. c. 107. f. 24. and the *stat.* 33 *Geo.* 3. c. 8. f. 3. tho' the substitute were not previously approved by two deputy-lieutenants or inrolled. *Ibid.*]

So, by the *ff.* 13 & 14 *Car.* 2. 12. f. 21. it is enacted, that where in *Lancashire*, &c. and many other counties, for the largeness of the parishes the inhabitants cannot reap the benefit of the *ff.* 43 *El.* 2. the

the poor in every township or village in the said counties shall be maintained, kept, &c. in the township or village where he inhabits or was last settled: and there shall be yearly chosen two or more overseers of such township, &c. who shall execute all powers for relief of the poor, &c. And the justices shall have the same powers to do every act in such township or village, &c. as they might do in any parish, &c. by the *st.* 43 *El.* 2.

[As to the meaning of the phrase "that a parish cannot reap the benefit of the statute," see *Rex v. Leigh*, *T.* 30 *Geo.* 3. 3 *T. R.* 748.]

[In order to appoint separate overseers for townships in one parish, it must appear that the parish is so large that the inhabitants cannot reap the benefit of 43 *Eliz.* *Peart v. Westgarth*, *H.* 5 *Geo.* 3. 3 *B. M.* 1610.]

[If a parish has long had overseers for the whole, it shews they can reap the benefit of 43 *Eliz.* And future acquiescence under an order appointing separate overseers does not vary the right. *Ibid.*]

[Justices in sessions have no power to make such division, except on appeal. *Ibid.*]

[An appointment of separate overseers for the subdivisions of a parish cannot be supported, unless it expressly appear that the parish could not reap the benefit of the statute of *Elizabeth*. *Rex v. Uttoxeter*, *E.* 20 *Geo.* 3. *Dougl.* 346.]

[Where a parish consists of several townships, some of which maintain their own poor, and have immemorially had overseers separately appointed, the court will grant a *mandamus* for the separate appointment of overseers of the remaining townships. *Rex v. Horton*, *M.* 27 *Geo.* 3. 1 *T. R.* 374.]

[Where such a parish has immemorially had more than four overseers, that is a proof that they cannot have the benefit of the statute, and entitles each township to have separate overseers. *Ibid.*]

[Wherever there is a *constable*, there is a *township*. *Ibid.*]

[Where a township had for sixty or seventy years past (and before, for any thing that appeared to the contrary,) had separate overseers, and maintained its own poor separately from the parish at large, it was holden to be still entitled to the same privileges. *Rex v. Leigh*, *T.* 30 *Geo.* 3. 3 *T. R.* 746.]

[Where a parish consisted of two separate districts, each of which immemorially made a separate rate, but the money when raised was blended together in one joint fund, tho' applied in certain proportions, and the sessions did not find it as a fact that the parish could not reap the benefit of the statute of *Elizabeth*, it was holden that the districts were not entitled to maintain their own poor separately and distinctly, tho' since the year 1648 they have constantly had, in the whole, more than four overseers, some of whom were chosen separately by the hamlet, and tho' the hamlet-part has immemorially had a constable of its own. *Rex v. Newell*, *E.* 31 *Geo.* 3. 4 *T. R.* 266.]

And extraparochial places, having several houses, that may have the denomination of a vill, shall be within the benefit of that statute. *R.* 11 *Ann. Sal.* 486. *in marg.*

So, an extraparochial place may be charged in aid of another parish unable, &c. *Per Holt*, *Sal.* 486. *Carth.* 515.



So, a *mandamus* lies to justices of peace to appoint overseers in an extraparochial place to provide for the poor there. *R. 2 Mod. Ca. 39.*

But an extraparochial place, that has no appearance of a parish or vill, will not be within the provision of these statutes. *R. Sal. 486.*

[*Mandamus* will not lie to appoint overseers to an extraparochial place, unless it be a township or vill; which must consist of ten families, or have a constable, or at the least have the reputation of a vill. *Rex v. Showler, T. 3 Geo. 3. 3 B. M. 1391. Vide 1 Bl. 1419. 1 T. R. 376, 7.]*

So, generally, all vills within a parish may be charged for the relief of the poor of the whole parish. *R. 1 Sid. 292.*

'Tho' there was an antient chapel there, and some rates there; if it has not the reputation of a parish. *R. 4 Mod. 157.*

'Tho' the parish lies in several counties, if every part has not distinct officers and rates, and the reputation of a distinct parish. *R. Ray. 477.*

So, the whole parish ought to be charged together, and not a single part or vill. *R. Jon. 356.*

The rate may be levied before the quarter expires. *Semb. Mod. Ca. 214.*

[Justices may sign the rate, whether fair or not; that is proper for the jurisdiction of the sessions; and *B. R.* will not meddle with it. *Rex v. Justic. de Dorchester, M. 7 Geo. Str. 393.]*

If the justice of peace refuse to allow the rates, *B. R.* will send an attachment. *1 Sid. 377.*

There shall be an appeal upon an account before two justices. *Sal. 533.*

[There may be an appeal from a rate to the sessions of a borough. *Rex v. Taunton, P. 12 Geo. Fort. 325.]*

Upon an appeal by particular persons, the sessions may quash the whole rate, and order a new one by themselves; or direct the officers to make it. *R. Sal. 483. 524.*

[The sessions may quash a rate without giving their reasons. *R. v. Justices of Cornwall, T. 7 Geo. 3. 4 B. M. 2602.]*

But they cannot order a standing rate. *R. Sal. 526.*

Every inhabitant shall be rated according to his visible estate, real or personal, in the same parish only. *Per all the J. 2 Bul. 354. [Covp. 565.]*

[A corporation seised of lands in fee for their own profit, are to be considered as *inhabitants* and occupiers of such lands, within the meaning of the *st. 43 El. c. 2.* and rateable to the poor. *Covp. 79. Vide Doug. 401. 3 T. R. 385.]*

[Lands purchased by a company, and converted into a dock, according to an act of parliament, which declares that the shares of the proprietors shall be considered as *personal property*, are rateable to the poor in proportion to the annual profits. *1 T. R. 319.]*

[If a man rent a quantity of land, together with a mineral spring arising therefrom, at a gross yearly rent, he is rateable for the whole of such rent; tho' the annual value of the mere land be only in proportion of one to four of the reserved rent. *Covp. 619.]*

[A house

[A house and engine for carding cotton, which are rented as one entire subject, and described by the general name of an engine house, may be rated. 1 *T. R.* 727.]

[So, the profits of a weighing machine house. *Id.* 723. *n.*]

Things real, which render an annual revenue, shall be rated as well as land: as, shops, and sheds.

Quit-rents. *Semb. Carth.* 14. [*Contra* 2 *Bur.* 991.]

Salt pits, and the toll of a market.

[The grantee of a navigation of a river is rateable in respect of the tolls arising from a sluice erected within the parish, tho' he himself reside, and the tolls be collected elsewhere. *Cowp.* 581. *Vide* 2 *T. R.* 660. *Vide* 4 *T. R.* 21.]

[Where by a navigation act the proprietor was entitled to a toll of 4s. *per* ton for goods carried from *A.* to *B.* or from *B.* to *A.* and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held that the tolls for goods carried the whole voyage from *A.* to *B.* are rateable in *B.* tho' in fact they are collected in a parish between *A.* and *B.*; because the tolls become due where the voyage is completed. *Rex v. Page*, *H.* 32 *Geo.* 3. 4 *T. R.* 543.]

[A navigation act empowered the proprietors to take so much *per* mile *per* ton for all goods carried along the canal; held that they were rateable for the tolls in the different parishes where they became due, that is, *where the respective voyages finished*; tho' for their own convenience they were authorised to collect the tolls where they pleased, and did in fact collect them in other parishes. *Rex v. Staffordshire Canal*, *M.* 40 *Geo.* 3. 8 *T. R.* 340.]

[The tolls of a bridge are rateable. *Doug.* 305.]

[The uncertainty of the value is not material. *Ibid.* 303.]

[Nor, the tenure under which it is occupied, whether in fee for life, years, or by a keeper or servant in lieu of wages. *Ibid.* 1 *T. R.* 343.]

[Therefore the ranger of a royal park is rateable as such for inclosed lands in the park yielding certain profits. *Ibid.* 338.]

[Affirmed in the *Exchequer Chamber*, *M.* 34 *Geo.* 3. 2 *H. Bl.* 265.]

Tythes for the clergy are subject to all charges imposed by parliament. *R.* 5 *Car.* 1. *Per* all the *J.* in England, *ut dicitur per Hale.* 1 *Vent.* 273.

[So, a *modus* for tythes is rateable. *Doug.* 405.]

[But a mere easement is not rateable. 2 *T. R.* 94.]

[*A.* having granted to *B.* a lease for years of way-leaves (for the purpose of carrying coals) and the liberty of erecting bridges and levelling hills over certain lands, *B.* made the waggon-ways, inclosed them, erected bridges, and built two houses on the land for his servants; and it was holden that *B.* was liable to be rated for "the ground called the waggon-way." *Rex v. Bell*, *E.* 38 *Geo.* 3. 7 *T. R.* 598.]

[A vicar is chargeable. *Rex v. Turner*, *H.* 4 *G. Str.* 77.]

[Sessions may moderate, but cannot discharge. *Ibid.*]

[In a private statute, where only lands and tenements are made chargeable

chargeable to the poor, tythes are rateable; for they are a tenement. *Rex v. Skingle, T. 4 G. Strange, 100.*]

[The parson or his tenant, tho' they take a composition, are chargeable as occupiers of the tythes; not the tenant of the land, tho' he has a retainer of tythe. *Rex v. Lambeth, T. 8 G. Fort. 318. Str. 525.*]

Lands which belong to an hospital. *R. Sal. 527.*

[But an hospital (supported by voluntary charitable contributions for the relief of the sick) is not rateable, for there is no occupier; the lessees are mere nominal trustees; the servants only attend the charity, and are not like the officers in *Chelsea*, &c. who have apartments which are considered as their houses; the patients cannot be considered as occupiers for this purpose. *Rex v. St. Luke, M. 1 G. 3. 2 B. M. 1053. Rex v. St. Bartholomew, T. 9 G. 3. 4 B. M. 2435.*]

[A person employed by the philanthropic society to superintend the children at annual wages, under an agreement that she shall have a dwelling free from taxes, &c. with certain other perquisites, and who may be dismissed on a minute's warning on being paid three months' wages, is not rateable. *Rex v. Field, E. 34 Geo. 3. 5 T. R. 587.*]

[The lessees of lead-mines paying no rent but only a part of the ore raised, are not rateable. But *Q.* if they would be rateable if they paid a rent? *Lead Company v. Richardson, M. 3 G. 3. 3 B. M. 1341. H. T. R. 730.*]

[The lessee of a coal mine is rateable, tho' he derive no profit from it. *Rex v. Parrot, E. 34 Geo. 3. 5 T. R. 593.*]

[A master of a free school appointed by the minister and inhabitants of the parish under a charitable trust whereby a house, garden, &c. were assigned "for the habitation and use of the master and his family freely without payment of any rent, income, gift, sum of money or other allowance whatsoever," for the teaching of ten poor boys of the inhabitants, is rateable for his occupation of the same. *Rex v. Catt, T. 35 Geo. 3. 6 T. R. 332.*]

[But the person to whom *lot* and *cope* are paid by the adventurers, without his running any risk, is rateable for these profits. *Cowp. 451.*]

[So, a person entitled to toll tin and farm dues, (which are certain portions of the tin raised by adventurers in the tin mines,) is rateable for these. *3 T. R. 480.*]

[If justices expressly state that beech is timber by the custom, altho' they afterwards state many immaterial things, and insufficient reasons, and conclude, "and therefore we are of opinion that beech is timber, &c. and therefore not rateable," the court will not quash the order. *Rex v. Minchin Hampton, H. 2 G. 3. 3 B. M. 1308.*]

[A man is not chargeable as occupier of a dissenting meeting-house. *Rex v. Reed, H. 13 G. Fort. 306. Str. 745.*]

[The trustees of a quaker's meeting-house, of which no profit is made by the pews, &c. are not rateable to the poor. *Rex v. Woodward, M. 33 Geo. 3. 5 T. R. 79.*]

[An officer of the salt office is not rateable in respect of his salary. *Rex v. Shalfleet, Sherrington's Case, H. 7 G. 3. 4 B. M. 2011.*]

[A trades-



[A tradesman is not rateable for his stock in trade. *Semb. Rex v. Ringwood, T. 15 G. 3. 4 B. M. 2295. Vide Cowp. 564.*]

[Where it has been the *usage* in a parish to rate persons to the poor for *their stock in trade within the parish*, such persons are liable under the statute of *Elizabeth* to be rated in respect thereof. *Rex v. Hill, T. 17 Geo. 3. Cowp. 613.*]

[Stock in trade is rateable, when its value can be clearly ascertained. *Rex v. Mast, H. 35 Geo. 3. 6 T. R. 154.*]

[If it be the property of the person in possession, and productive. *Rex v. Darlington, M. 36 Geo. 3. 6 T. R. 468.*]

[The circumstance of its having been rated one year is *prima facie* evidence of its being productive the next year, and if not contradicted by other evidence, is sufficient to warrant the justices in deciding that it should be then rated. *Ibid.*]

[An attorney is not rateable in respect of the profits of his profession. *Rex v. Startifant, M. 37 Geo. 3. 7 T. R. 60.*]

But the occupier pays the tax to the poor, not the lessor. *Per all the J. in England. 2 Bul. 354.*

[The landlord is never assessed for the rent; because that would be a double assessment, as his lessee has paid before. *Cowp. 453.*]

[If the owner of a house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person. *Rex v. Durham, M. 32 Geo. 3. 4 T. R. 477.*]

[The occupier of land is liable to be rated, without considering whether he has any title. *Rex v. Bell, E. 38 Geo. 3. 7 T. R. 598.*]

Tho' the lessor covenants to pay taxes upon the land; for this lies upon the occupier. *R. 2 Mod. Ca. 314.*

[Yet if a landlord tender the *rate* for his *tenant*, the overseer ought to receive it, and a warrant ought not to be granted to distrain the tenant. *Doug. 427.*]

And if an occupier of land in *B.* has no goods there he may be distrained where he inhabits in another parish. *Per Holt, at Hertford, 1698.*

If it be in the same county. *Adm. Mod. Ca. 214, 215.*

So, if rated in *A.* and he afterwards removes to *B.* *Per Holt, Mod. Ca. 214, 215.*

The lessee of a stall in a market shall not be charged. (This was for repairs of a church.) *2 Rol. 238. 2 Rol. 289. l. 35.*

[An exemption in a private statute in 12 *Car. 2.* of lands given to charitable purposes "from all *public* taxes, charges, and assessments whatsoever, civil or military," extends to the *poors' rate*. *Rex v. Scot, E. 30 G. 3. 3 T. R. 602.*]

[The possessions of the crown or of the public are not rateable. *2 T. R. 372.*]

[Therefore stables rented by the colonel of a regiment by order of the crown for the use of the regiment, are not rateable. *Ibid.*]

[But persons holding houses or lands under the crown, or under any hospital, if for their own *separate use*, are rateable. *3 T. R. 497. Vide 4 T. R. 6.*]

Several families shall be rated severally. *R. Sal. 532. Mod. Ca. 214.*

The rate shall be only for a month. *Ibid.*

[By *stat. 17 G. 2. c. 37.* waste lands improved, and drained lands, shall pay to the parish which lies nearest to them; and quarter session may determine disputes.]

[*B. R.* will not set aside a rate confirmed by sessions unless manifestly unequal. *Rex v. Brograve, M. 10 G. 3. 4 B.M. 2491. Cowp. 579.*]

[It is proper that lands should be higher rated than houses. *D. per Ld. Mansfield. Ibid.*]

[*N. B.* In this case the proportion had been agreed to by all the parish and by defendant himself. *Ibid.*]

[Every person is to be rated to the poor according to the present value of his estate, whether that value has or has not been increased by his own improvements. *Rex v. Maft, H. 35 Geo. 3. 6 T. R. 154. Rex v. Skingle, E. 38 Geo. 3. 7 T. R. 549.*]

[Whether houses shall be rated in a different proportion from land must depend on local circumstances, and the court will not quash an order for rating them equally. *Doug. 562.*]

[The justices below are the proper judges of the equality of poor-rates; and the court of *B. R.* will not interfere, on the ground of their being unequal, unless the inequality be manifestly apparent on the rate. *2 T. R. 660.*]

[If a rate appear to be illegal by the title, the court of *B. R.* will quash it tho' no special case has been stated. *Doug. 116.*]

[If upon an order of sessions, adjudging that certain persons ought to be added to a rate, and ordering the rate to be amended accordingly, the sessions omit to state, that such persons had notice, or appeared and were heard, it is fatal. *Cowp. 564. Contra 1 T. R. 625.*]

[It is said, that on appeal to a poor's rate, on the ground of particular persons or particular property being omitted in the rate, the sessions ought not to quash the whole rate, but to amend it in those particulars. *Cowp. 326. Cont. 1 T. R. 6. Rex v. Darlington, M. 36 Geo. 3. 6 T. R. 468.*]

[On an appeal against a poor-rate because *A.* and *B.* were not rated for their stock in trade, the sessions quashed the rate, and stated a case for the opinion of the court of *B. R.*; in which it was stated that *A.* and *B.* were in the possession of so much stock in trade, &c. but that it was not proved at the sessions whether it belonged to *A.* and *B.* or whether it produced profit. The court quashed the order. *Rex v. Dursley, M. 35 Geo. 3. 6 T. R. 53.*]

[But where any error in a rate affects the proportion payable by every person rated, the rate must be quashed *in toto.* *Doug. 563.*]

[Yet where a person is overcharged in a poor-rate, the sessions may relieve him on appeal, and amend the rate by lessening the sum assessed on him, under the *17 G. 2. c. 38.* *2 T. R. 623.*]

[In a reserved case it is not necessary to state that the rate was regularly published in the church, if that question was not intended to be referred. *Ibid.*]

[A *certiorari* does not lie to remove a poor-rate, because of the public inconvenience that would attend such a removal. *2 T. R. 235. Vide 4 T. R. 12.*]

[If a person rated to the poor has any objection to the rate; *e. g.* that

that it is made for six months; he must appeal to the next sessions; and if he do not appeal, he cannot bring trespass against those who distrain on him for non-payment of the rate. *Durrant v. Boys, B. R. H. 36 Geo. 3. 6 T. R. 580.*

(B 67.) *In charging the hundred or county.*] By the *st. 43 El. 2.* if the parish be not able, &c. such two justices of peace may rate any of another parish in the hundred as they think fit: and if the hundred is not able, the justices at the quarter sessions shall rate any of another parish in the county to pay such sum, &c. as they think fit.

[A county rate may be levied *de novo* for a town erected into a county of itself by charter many years before, altho' till that time no such rate had ever been levied, the corporation having defrayed the expences out of their own funds. *James v. Green, B. R. E. 35 G. 3. 6 T. R. 228.*]

Two parishes cannot be rated together for relief of the poor of both; but if one be insufficient, the other may be charged in aid of it. *Per Holt, M. 3 W. & M. Vide Sal. 480, 481.*

The charge may be upon one or more inhabitants in a parish, for aiding of the other parish. *2 Bul. 353. R. 1 Vent. 350. Sal. 481.*

If a parish be taxed in aid of another, the tax may be enlarged or diminished, when the poor in the other parish encreases or decreases. *Per Jon. 2 Bul. 353.*

So, a tax may be assessed in gross upon a parish to the relief of another. *Sal. 480, 481.*

Or, any in such parish, without assessing the whole parish. *R. 1 Vent. 350. Sal. 481.*

Or, an extraparochial place. *Per Holt, Carth. 515. Sal. 486.*

[Justices may order one parish to pay a gross sum to another, but they themselves must make the rate on all or on particular persons, and not delegate their power of assessing to the churchwardens and overseers. *St. Peter and Paul in Marlbro's Case, T. 12 G. 2. Str. 114.*]

[The order must be to raise a sum certain, not so much in the pound. *Rex v. Telfcombe, T. 6 G. Str. 314.*]

[An order to contribute *so long as the said justices shall think fit*, is bad; they are to determine the *quantum*, not the duration. *Rex v. St. Mary in Marlbro', P. 12 G. Str. 700.*]

But the justices at the sessions cannot make a parish contributory to another, unless it be first ordered by two justices. *R. 5 Mod. 397.*

[Sessions have power to order one parish to relieve another only when out of the hundred, and two justices only when in the same hundred. *Inhabitants of Freeport, T. 4 G. Fort. 303.*]

[Justices at sessions can charge parishes out of the hundred to contribute to the poor of a parish in that hundred, altho' two justices have not adjudged that no parish within the hundred is able. *Rex v. Percival, T. 3 G. Str. 56.*]

The word "hundred" is not essential in an order of two justices; if the division is called by any other name equivalent, it is equally within the intention of the act: thus, *that A. and B. both lie in the same liberty of the foke*, is good, if such division is *substantially* a hundred. *Rex v. Milland, P. 31 G. 2. 1 B. M. 576.*

[The



[The order must shew that the place taxed in aid is out of the parish. *Inhabitants of Borough Fenn, T. 12 Geo. Fort. 326.*]

(B 68.) *In charging the relations.*] By the *st. 43 El. 2.* the father, grandfather, mother, grandmother, and children of a poor impotent person, being of ability, shall at their own charge maintain such person, according to the rate, that the justices of peace of the county, where the sufficient person dwells, at the quarter sessions shall assess, on pain of 20*s.* per month, to be levied by two justices of peace, or mayor, &c. by distress and sale, &c.

An order upon a relation for relief, shall be made at the quarter sessions of the county where the party charged inhabits, otherwise it is void. *R. 2 Bul. 345.*

And it is not good, unless it appears that the party relieved is not able to work. *Semb. 2 Bul. 344.*

The putative grandfather of a bastard is not chargeable within this statute; for the law knows no such person. *Semb. 2 Bul. 344. R. 1 Vent. 310.*

Nor, the wife of the putative father; for a bastard is not within the statute. *Vide 2 Bul. 346. Per two J. 2 Bul. 350.*

If a man marry the grandmother of an impotent person, with whom he has a substance, he is chargeable in respect of the substance which he had with his wife, and shall be said to be grandfather. *2 Bul. 345. R. 2 Bul. 346.*

So, if land descend to the wife after marriage. *2 Bul. 347.*

Otherwise, if he had not any substance with her in marriage. *Per Cro. 2 Bul. 345. Per two J. 2 Bul. 346.*

Tho' he afterwards becomes able by the industry of his wife. *Per Cro. Whitl. cont. 2 Bul. 347.*

Nor, shall he be charged after the death of his wife, tho' he had a substance with her. *Per Cro. 2 Bul. 347. cont. Comb. 405.*

[A man is not bound to provide for his wife's mother, tho' he had substance with her in marriage, either within the words or intent of statute, which provides only for natural parents. *R. per Cur. and 2 Bulst. 345. supra* denied to be law. *Rex v. Munden, T. 5 Geo. Str. 190. Fort. 303. 4 T. R. 119.*]

[The husband is not bound to maintain the wife's child by a former husband. *4 T. R. 118.*]

[The father-in-law is not obliged to maintain his daughter-in-law. *Rex v. Benoier, M. 13 Geo. Ld. Raym. 1454. Rex v. Dempson, M. 7 Geo. 2. Str. 955.*]

By the *st. 5 Geo. 8.* churchwardens or overseers, by order of two justices, may take goods or rents of lands, &c. of the husband, father, or mother, who leaves his wife or children a charge to the parish: and the order being confirmed by the quarter sessions, the justices there may direct a sale of the goods; and the overseers shall be accountable to the quarter sessions.

A father charged is not to be committed, till an order made and refusal by him to pay the 20*s.* per *ensem*, and a default of distress. *Vide 2 Bul. 344.*

The quarter sessions may order a father to pay 2*s.* a-week, till other order. *R. Sal. 534.*

If there be a bond to save a town harmless from *A.* his wife and children, it extends to children born afterwards, or before. *R.*

*Skin. 556.*

And to the children of the son during his life, not afterwards.

*Skin. 557.*

(B 69.) *Relief of poor prisoners, maimed soldiers, and mariners, &c.]*  
By the *st. 43 El. 2.* justices of peace at *Easter* sessions shall rate every parish in a county or corporation, at a weekly sum not above *6d.* nor less than a  $\frac{1}{2}d.$  in any parish, nor above *2d.* for every parish, one with another through the county, to be assessed by agreement among the parishioners, or in default by the churchwardens and petty constables of the parish, or in their default by order of a justice of peace in or near the parish, and to be levied by the churchwarden or constable, or in their default by a justice of peace by distress and sale of the offender's goods, and for want of distress, a justice of peace may commit without bail, till payment. And the justice of peace at such quarter sessions shall set down what sum shall be sent quarterly to the prisoners of the King's Bench and Marshalsea, and each hospital and alms-house in the county, so as *20s.* yearly be sent to each of the said prisons out of each county; and the residue employed to the relief of hospitals in the county; and of sufferers by fire, water, and other casualties, and such other charitable purposes as the justices at quarter sessions shall think meet: which sums rateably assessed on every parish, the churchwardens shall collect and pay to the high constable quarterly, ten days before every quarter ends, on pain of *10s.* and the high constable at the quarter sessions, to the treasurer of the county, on pain of *20s.* to be levied with the said sums for the said charitable purposes by the treasurer, by distress and sale; and the treasurer shall pay the sum for the prisons to the chief justice of *England*, or, if none, to the next ancient judge, and the knight marshal, equally to be divided, taking their acquittance for the same.

By the *st. 43 El. 3.* justices of peace at *Easter* sessions in a county or corporation, shall charge on every parish a weekly sum for relief of soldiers and mariners, sick and hurt in her majesty's service, not above *10d.* nor less than *2d.* in any parish, nor above *6d.* for every parish, one with another, where there be above fifty parishes in a county, to be assessed and levied *ut supra* for prisons, &c.; and to be collected and paid by the churchwardens and petty constable of the parish to the high constable, ten days before every quarter session, on pain of *20s.* and by the high constable at the quarter sessions to the treasurer of the county on pain of *40s.*; to be levied *ut supra* for augmentation of the stock.

And such soldier or mariner shall go to the treasurer of the county whence prest, or if not prest, of the county where born, or last dwelt for three years, at election, or if not able to travel, of the county where he lands, and bring a certificate under the hand and seal of the general of the camp, or governor of the town, or his marshal or deputy, and of the captain under whom he served, or his lieutenant, or of the admiral or other general at sea, or captain of the ship; which certificate shall be allowed by the general muster master in this realm, or treasurer and comptroller of the navy; on which certificate such treasurer shall allow him a convenient subsistence till

the quarter sessions, when the justices of peace may grant him an annual pension for his life; if no officer, not above 10*l.*; if an officer under a lieutenant, not above 15*l.*; if a lieutenant not above 20*l.*; to be paid quarterly by any treasurer of a county; but the justices of peace may alter or revoke such pension.

And till such soldier or mariner can arrive to a county where they may have such pension, or to the muster master general, who is to allow such certificate, the treasurer of the county where he lands, so of every county, before such allowance, may give them relief for their journey through that county, and a testimonial to pass to the place of pension.

And the residue of the stock shall, at the discretion of the justices at the quarter sessions, be bestowed for the charitable designs of the statutes for relief of the poor and punishment of rogues, or reserved for the future relief of maimed soldiers and mariners.

By the *st.* 14 *El.* 5. justices of peace at the quarter sessions in a county or corporation, may rate every parish not above 6*d.* or 8*d.* per week for relief of the common gaols, which the churchwardens shall levy every Sunday, and pay once a quarter to the high constable, who shall pay at the quarter sessions to such as the justices of peace shall direct, who shall weekly distribute the same to the relief of the prisoners, on pain of 5*l.* for default in any officer, a moiety to the queen, a moiety to the prisoners. [*Vide the st.* 19 *Car.* 2. 4.]

By the *st.* 5 *Ann.* 32. if the gaol or *Marshalsea* money be not sufficient, the justices at quarter sessions may assess what they think reasonable for the constables' time and expence in passing vagrants.

If the money for the prisoners in the *Marshalsea* and maimed soldiers, is not duly paid, *B. R.* upon motion will grant an attachment against the sheriff of the county, and take any of the county in *Withernam* for it, if the sheriff does not pay for it. *R. Skin.* 227.

But justices of peace cannot limit the stock of the county to the charge of the prosecution of a barretor. *R. B. R.* 2 *Ann.* between the *Queen and Inhabitants of Hertford*, *Sal.* 605.

They cannot, by the same order, direct the payment to gaols, upon the *st.* 14 *El.* and the *st.* 19 *Car.* 2. *R. Sal.* 487.

(B 70.) *Treasurer of a county.*] By the *st.* 43 *El.* 2 & 3. justices of peace at *Easter* sessions shall elect, of themselves or others, two treasurers, who shall continue one year and then give up their accounts to their successors.

And if the treasurer refuse the office, or to relieve maimed soldiers or mariners, &c. or neglect his duty, or refuse to account, as the justices direct, the justices of peace, or in their default the judges of assize, may fine him, to be levied by distress and sale, &c. and may appoint any two justices of peace to prosecute him.

Mayor and justices of a corporation may appoint one to receive and pay money within the corporation, who shall do and be subject to the penalties of an high constable.

By the *st.* 5 *Ann.* 32. treasurers shall obey orders of quarter sessions for paying sums to pass vagrants, if they have money in hand to pay.

[Money to pass vagrants should be raised quarterly; but a presentment of the grand jury is not necessary. *Rex v. Justices of Middlesex*, *H. 9 Geo.* 2. *Str.* 1028.]



[By 12 Geo. 2. c. 29. §. 1. quarter sessions may make one general county-rate; §. 2. which shall be paid by the overseers out of the poor's rates to the high-constable; §. 3. and if no poor's rate, to be levied by the petty constable; §. 4. except in the Northern counties; §. 5. except persons not before liable; §. 6. the money to be paid to the treasurer, and by him as the sessions direct.]

[By 13 Geo. 2. c. 18. §. 6. justices of liberties may act for their liberties according to 12 Geo. 2. c. 29.]

[By stat. 17 Geo. 2. c. 5. the treasurer shall repay the high constable the expence of passing vagrants.]

[By stat. 25 Geo. 2. c. 36. on conviction for felony, the court may order the prosecutor's expences to be paid by the treasurer.]

[If a fine be imposed on the county, which the justices at the sessions think illegal, they may order the treasurer to defray the expence of litigating the question out of the county stock. *Rex v. Essex*, E. 32 Geo. 3. 4 T. R. 591.]

[Justices of the peace at the quarter sessions have no authority to order the costs of a prosecution of a misdemeanour, carried on under the direction of magistrates, to be allowed out of the county rates. *Rex v. West Riding of Yorkshire*, M. 38 Geo. 3. 7 T. R. 377.]

[By stat. 27 Geo. 2. c. 3. the expences of conveying person committed to gaol or house of correction by justices' warrant, shall be settled by a justice, and paid by the treasurer; in *Middlesex* by the overseers.]

[The stat. 18 Geo. 3. c. 19. enables the court in certain cases to make an order on the treasurer of the "county, riding, or division," where the offence was committed, to pay the prosecutor and his witnesses their expences.]

[This statute extends to inferior districts having jurisdiction to try felons, and raising their own rates similar to the county rates. *Rex v. Myers*, E. 35 Geo. 3. 6 T. R. 237.]

[The charges of attendance of a poor person bound to give evidence on felony may be settled by court, and shall be paid by treasurer; except in *Middlesex*.]

[The court of B. R. will not grant a *mandamus* to the treasurer to obey an order of the court of quarter sessions. *Rex v. Bristow*, H. 35 Geo. 3. 6 T. R. 168.]

[The proper remedy, in case of his refusal to obey such order, is by indictment. *Ibid.*]

[*Vide Burn's Justice*, tit. county-rate, where all the acts empowering justices to allow charges are collected.]

(B 71.) *Settlement of poor. By the common law.* By the common law, the place of birth, or last habitation, are proper for the settlement of poor persons. *Per J. of Assize*. 2 Bul. 350. 352.

And therefore, a bastard, who has gained a settlement, shall be sent thither, and not to the place of his birth. R. 2 Bul. 350.]

A child born in an house of correction shall be sent to the place where the mother had a settlement. 2 Bul. 358.

The son or daughter of a vagrant, who has no settlement, shall be sent to the place of the birth, not being seven years of age; for it cannot gain a settlement where the parents die. 2 Bul. 351. Ray. 477.

A poor

A poor child shall be sent to the place of settlement, and not of birth. *Ray. 477.*

So, an idiot. *Sal. 427.*

And if one be sent as a vagrant, he may afterwards be sent to the place of settlement. *R. Sal. 526.*

The settlement of the parent settles his child. *R. Sal. 528, 9.*

Tho' under seven years. *Sal. 527.*

An order for the settlement of a child after the age of seven with its parent, is not good, unless it shews that it had no other settlement; for it might have gained a new settlement. *R. Sal. 470.*

And if a child be sent with the mother, till the age of seven years, it shall be only for nurture, and it shall be maintained at the charge of the parish where it is settled. *Sal. 482. 528.*

But an order by two justices to the overseers of *B.* for the relief of a poor person, does not determine, but presumes his settlement there. *R. 1 Sal. 123.*

So, a bastard shall be sent to the place of his birth, if he has not gained another settlement, and not with the mother. *R. Sal. 485.*

So, there cannot be any order for sending a poor person to an extraparochial place. *R. Sal. 486, 487. Carth. 515.*

(B 72.) *By statute.*] By the *st. 13 & 14 Car. 2. 12.* on complaint of the churchwardens and overseers to a justice of peace, within forty days after any person's coming to settle in a tenement under 10 l. *per ann.* to justices of the peace, (1 *quor.*) of the division may remove such person likely to be chargeable, to the parish where last legally settled as a native, householder, sojourner, apprentice, or servant for forty days at least, unless he give security to be allowed by such justices for the discharge of the parish. *Vide Appeal, post. (B 74.)*

Provided, if any come to any parish for harvest or other work, with a certificate from the minister and a churchwarden and overseer of another parish, declaring him an inhabitant there, tho' he stay after the work done, or fall sick, he shall not gain a settlement, but be sent by two justices to his habitation in the other parish. *Ibid.*

If the continuance of forty days be by request, and money given by the parishioners of the other parish, the party shall be settled where he lived the forty days. *R. 3 Mod. 67.*

If one hire a mill of 10 l. *per ann.* it makes a settlement; for it is a tenement. *R. Sal. 536.*

If he hire 5 l. *per ann.* of one, and another 5 l. *per ann.* of another in the same parish. *Sal. 535.*

By the *st. 1 Jac. 2. 17.* the forty days to make a settlement shall be accounted from delivery of notice in writing of the abode and number of the family, if any, to one of the churchwardens or overseers of the parish.

And, by an equitable construction of the statute, an act shall be accounted equivalent to notice: as, if he pays parish rates; for then he does not conceal himself. *R. P. 1 W. & M. B. R. Sho. 12. Carth. 28.*

Or, lives in the parish for four years, and works in the highway. *Semb. T. 3 W. & M.*

Or, be a servant or apprentice there. *Per Cur. M. 3 W. & M.*

By

By the *ſt.* 3 & 4 *W. & M.* 11. the forty days to make a ſettlement ſhall be accounted from the publication of notice in writing of the abode and number of the family, delivered to the churchwarden or overſeer, which he ſhall cauſe to be read publickly in the church next Lord's day, and to be regiſtered, on pain of 40*s.* for neglect of each to the party grieved, to be levied on proof by two witneſſes before a juſtice of peace, by diſtreſs and ſale, and for want of diſtreſs, &c. by commitment to gaol.

But no ſoldier, or workman in their majeſties' ſervice, ſhall gain a ſettlement by publiſhing ſuch notice, unleſs it be after his diſmiſſion from their majeſties' ſervice. Nor, ſervice in a ſhip, boat, &c. *F. g.* 255.

Provided, no notice needful, if any on his own account execute in a pariſh any annual office, or charge for a year, or be rated, and pay his ſhare to the publick taxes of the pariſh, &c. or, being unmarried and childleſs, be lawfully hired for a year, and it is declared by the *ſt.* 8 & 9 *W.* 3. 30. abide in the ſame ſervice during one whole year; but that goes only to future times. *R. Sal.* 525.

Or, be bound apprentice by indenture, and inhabit in any pariſh.

[Serving the office of conſtable, as ſubſtitute for another, is not ſerving an office ſo as to gain a ſettlement. 1 *Bl. Rep.* 452.]

[An aſſeſſment and payment of a poor's rate by the tenant, will gain him a ſettlement, tho' the landlord has privately agreed to pay it. *Ibid.* 463.]

Now, no collateral act amounts to notice: as, banns of marriage publiſhed in the church. 5 *Mod.* 454.

If he beord or be nurſed in a pariſh. *Sal.* 524.

So, notice ſhall not be preſumed; for it is matter of evidence. *Sal.* 472.

Nor, ſhall be ſupplied. *R. Sal.* 476.

It is ſufficient, if the houſe be rated, and he pays. *R. Sal.* 478.

For he muſt pay. *R. Sal.* 523. *Skin.* 620.

If he be choſen pariſh clerk, and has it for a year. *R. Sal.* 536.

The hiring muſt be for a year at the firſt; for an hiring for half a year, and afterwards for another half year, by the ſame maſter and in the ſame place, is not ſufficient. *R. Sal.* 535.

[Being hired to work by the piece or groſs, and continuing five years on that contract, gains no ſettlement. 1 *Bl.* 443.]

Marriage in ſervice is not a diſcharge from the maſter, without his will. *R. Sal.* 527.

Nor, does it prevent the ſettlement. *Ibid.*

If he be married in the ſervice, it will be a ſettlement, if he was not ſo at the time of the hiring. *Ibid.*

If a man ſerve a barber for a year for 6*l.* to be inſtructed, without being bound, he will be a ſervant there. *R. Skin.* 671. *Sal.* 479. *S. C. cont.*

If an apprentice be aſſigned to a maſter in another pariſh, tho' it is not a proper aſſignment, the ſettlement will be good. *R.* 1 *Sal.* 68.

[An apprentice diſmiſſed without cancelling the indenture gains no ſettlement by a ſubſequent ſervice with another maſter, ſo long as the term continues. 1 *Bl.* 553.]

[But a pariſh apprentice may agree with his maſter to cancel his indentures



indentures at twenty-one, tho' bound till twenty-four, and gain a settlement of his own. 1 *Bl.* 592.]

Otherwise if put apprentice by his master by agreement, without indenture. *R. Sal.* 479. *Skin.* 671. *S. C. cont.*

An apprentice, or servant, continuing with his master in *B.* shall be settled there, tho' the master is not settled there. *R. Sal.* 533.

[An apprentice assigned to *A.* and going to live with *B.* on condition to pay *A.* a guinea a-year, gains a settlement by the first forty days' service with *B.* 1 *Bl.* 635.]

By the *st.* 8 & 9 *W.* 3. 30. if any person bring a certificate to the churchwardens or overseers, under the hands and seals of the major part of the churchwardens and overseers of the other parish, with two witnesses, and allowed by two justices of peace, owning such person or persons to be settled there, such certificate shall oblige the parish that gave it to receive such persons and their children, tho' born in the other parish, not having otherwise acquired a legal settlement, (which is acquired by the *st.* 9 & 10 *W.* 3. 11. only if he *bonâ fide* hire 10 l. *per annum*, or execute an annual office there,) when they become a charge to, or ask relief of the parish to which the certificate was given, and not before.

[Renting 10 l. *per annum*, and immediately letting off the greater part to an under-tenant, and residing on the rest, gives a settlement. 1 *Bl.* 603.]

If a man, resident by certificate, took an apprentice by indenture, he would have been settled there. *Adm.* in the *st.* 12 *Ann.* 18.

But by the *st.* 12 *Ann.* 18. any, on or after the 24th June 1713, bound apprentice, or hired in a service to one who resides by certificate only, shall gain no settlement thereby.

A man who settles in a tenement under 10 l. *per annum* of his own inheritance, shall not be removed. *Per two J. Herbert cont. H.* 2 & 3 *Jac.* 2. *Per Holt*, 5 *Mod.* 419.

[A wife cannot be removed from a tenement of 10 l. *per annum* in the occupation of her husband, tho' he resides elsewhere. 1 *Bl.* 466.]

Or, a copyhold. *R. Tr.* 4 *Geo.*

Or, a leasehold for 500 years.

Yet if a man has land in *B.* and never inhabits there, it is no settlement. *Sal.* 524.

If he works, but does not lodge there. 2 *Mod. Ca.* 308. 369.

If a certificate be allowed, no appeal lies for the allowance. *Sal.* 530.

Nor, shall a man be removed, till he is an actual charge. *Ibid.*

And there must be an adjudication that he was chargeable; for it is not sufficient to say that there was a complaint that he was a charge. *Ibid.*

A certificate does not make a settlement, if he had it not before, but is evidence of a settlement with the parish which gives it. *R. Sal.* 530, 531.—*R. cont.* 9 *Ann.* for it will be conclusive to all the world. *Sal.* 535.

[The first settlement of a person cannot cease but by gaining a new one. *Rex v. St. Botolph*, *H.* 28 *G.* 2. *B. S. C.* No. 118.]

[Therefore, if a woman marries a man who has no settlement, her maiden settlement remains, whether he is alive and absent, or dead; being

being never determined, but only as it were suspended, during the time she is under her husband's power and protection, and is maintained and supported by him. Not during his life, as was supposed in the case, *Rex v. Norton*, H. 12 G. 2. B. S. C. No. 39. where it was ruled contrary to the present decision, which was made on great deliberation. *Ibid. Westham v. Chidingstone*, H. 12 G. Str. 683.]

[By the *stat.* 35 Geo. 3. c. 101. it is enacted that no poor person shall be removed by virtue of any order of removal, until such person shall have become actually chargeable.]

[By the 6th section of the same act it is provided that every unmarried woman with child shall be deemed and taken to be a person actually chargeable within the intent and meaning of the act.]

[An unmarried woman may be removed to the place of her settlement on account of her being pregnant; under this statute, tho' she be residing under a certificate from her own parish. *Rex v. Great Yarmouth*, M. 39 Geo. 3. 8 T. R. 68.]

#### A Settlement is gained.

*By administrator or executor.*—[By the husband of administratrix of assignee of a term of ninety-nine years, living on the premises. *Murley v. Grandborough*, T. 4 G. Str. 97. Fort. 302.]

[And mortgagee for 15 *l.* and creditor by bond and simple contract for 18 *l.* more, and residence. *Rex v. Stockland*, H. 15 Geo. 2. B. S. C. No. 61. Str. 1162.]

[By executor entitled only to one fifth of a leasehold of 22 *l.* per annum, who proves the will alone, and resides forty days. *Rex v. Utoxeter*, T. 5 Geo. 3. B. S. C. No. 172.]

[The executor of a tenant from year to year of an estate under 10 *l.* a-year, may gain a settlement by residing on it forty days. And tho' he do not prove the will, the term is in him. *Rex v. Stone*, E. 35 Geo. 3. 6 T. R. 295.]

*Apprenticeship.*—[By apprentice where he serves, tho' the master to whom bound lives in another parish. *Holy Trinity v. Shoreditch*, M. 3 Geo. Str. 10. *Allhallows v. Saint Olave*, T. 9 Geo. Str. 554.]

[A contract of apprenticeship may be formed without using the term "apprentice." *Rex v. Laindon*, M. 40 Geo. 3. 8 T. R. 379.]

[If a poor boy be bound apprentice by the parish officers, with the consent of two justices of the county, to a master residing in a different parish and county, and all the parties, except the apprentice, sign the indenture, the apprentice will gain a settlement in the parish of the master by residing there 40 days under this indenture. 2 T. R. 726.]

[By apprentice (or servant) where he lies, tho' in a ship, and tho' he works and diets elsewhere. *Saint Mary Colechurch v. Radcliffe*, T. 3 Geo. Str. 60. Fort. 306. *Rex v. Feversham*, P. 7 Geo. Fort. 221. *Rex v. Saint John*, T. 10 Geo. Fort. 321. Str. 594. *Ld. Raym.* 1371. *Rex v. Burton Bradstock*, P. 5 Geo. 3. B. S. C. No. 171. *Rex v. Castleton*, M. 7 Geo. 3. B. S. C. No. 183.]

[By apprentice of a certificate-man, after he has purchased an estate. *Ivinghoe v. Stonebridge*, H. 6 Geo. Str. 265.]

[By apprentice living forty days, tho' not at one time. *Rex v. Cirenster*, H. 10 Geo. Str. 544.]

[Or, residing the last forty days, tho' a cripple, and not able to perform actual service. *Rex v. Charles*, T. 12 Geo. 2. B. S. C. No. 221.]

[So, serving forty days to an infant will give a settlement. *Rex v. Saint Petrox*, H. 31 Geo. 3. 4 T. R. 196.]

[By parish-apprentice let out by the master by parol for hire, without assent of justices, into another parish where he resides above forty days, the master receiving the wages and finding cloaths. *Rex v. Saint George*, M. 8 Geo. 2. B. S. C. No. 5. Str. 1001.]

[By apprentice allowed by his master to work for his own benefit, paying him 12d. a-week, and master furnishing a loom, where he resides separate from his master. *Rex v. Offerton*, P. 15 Geo. 3. B. S. C. No. 250.]

[By apprentice bound only for four years. *Rex v. Saint Nicholas*, M. 10 Geo. 2. B. S. C. No. 28. Str. 1066.]

[If the master of an apprentice die, and the executor, at the request of the apprentice, agree that he shall go to live with another person, a service of forty days with such person, before the term of the apprenticeship expires, will gain a settlement. *Dong. 70.*]

[By apprentice assigned over by widow (who had not administered) to a certificate-man, who by parol assigns (without the widow's knowledge, but she afterwards approved) to a third; settled with the third. *Rex v. Bridgeford*, T. 13 Geo. 2. B. S. C. No. 43. Str. 1115. *Rex v. Petham*, M. 14 Geo. 2. B. S. C. No. 54.]

[Yet, apprentice verbally dismissed by master's widow, who had not administered, is settled where he served his master. *Rex v. Chirk*, T. 14 Geo. 3. B. S. C. No. 242.]

[By apprentice, tho' duty not paid for thirty shillings given his master to clothe him. *Rex v. Owram*, P. 13 Geo. 2. B. S. C. No. 48. Str. 1132.]

[Tho' the apprentice is to be found all necessaries by his father, and no duty paid for such maintenance, master allowing 4s. per week for it, which is an equivalent. *N. B.* The master is not obliged to answer a question which tends to contradict his deed. *Rex v. Portsea*, T. 16 Geo. 3. B. S. C. No. 261.]

[By apprentice assigned by indorsement on the back of indenture, (voidable, and afterwards declared void by sessions,) without assent of justices. *Rex v. Saint Petrox*, T. 19 Geo. 2. B. S. C. No. 84.]

[By parish-apprentice assigned (without assent of justices) from first to second master, and by him, without assent of first, or of justices, to third, the consent of second including that of first. *Rex v. Clapham*, P. 20 Geo. 2. B. S. C. No. 91. *Rex v. Tavistock*, T. 7 Geo. 3. B. S. C. No. 186.]

[To enable an apprentice to gain a settlement by serving a second master, the service must be performed with the consent of his first master; his knowledge alone is insufficient. *Rex v. St. Pauls, Bedford*, M. 36 Geo. 3. 6 T. R. 452.]

[An infant binding himself by indentures of apprentice, leaving his master to go into the king's service, with his master's approbation, gained a settlement by having served his master 40 days. *Rex v. Hindringham*, H. 36 Geo. 3. 6 T. R. 557.]

[By apprentice to a mariner, tho' for four years only, and the indenture is not inrolled, nor the forty days' inhabitancy at one time. *Rex v. Gainborough*, P. 8 Geo. 3. B. S. C. No. 189.]



[By apprentice, tho' the consideration-money being 6 *d.* was not inserted in the indenture. *Rex v. Yarmouth*, *H.* 28 *Geo.* 2. *B. S. C.* No. 120.]

[Or, tho' the indentures are not stamp pursuant to *St.* 8 *Ann.* c. 9. if the consideration was paid out of a voluntary, yearly, charitable subscription *Rex v. Beibnal Green*, *H.* 7 *Geo.* 3. *B. S. C.* No. 185.]

[Or, if the consideration was paid out of a legacy, some of which was to be given to put children out apprentices; for it is a public charity. *Rex v. Clifton*, *H.* 12 *Geo.* 3. *B. S. C.* No. 219.]

[Money given by the parish officers (in the case of a voluntary binding) as the consideration of taking an apprentice, is not liable to the duty imposed by the statute of *Anne*, for it comes within the exception to it in *§.* 40. as being at the public charge of the parish. *Rex v. St. Petrox*, *H.* 31 *Geo.* 3. 4 *T. R.* 196.]

[Neither is any duty payable for any consideration money, unless it be given to the master or mistress of the apprentice. *Ibid.*]

[By apprentice, tho' the indentures are lost, or not produced, if other evidence is given of it. *Rex v. East-Knoyle*, *T.* 13 & 14 *Geo.* 2. *B. S. C.* No. 51. *Rex v. Saint Michael Bath*, *H.* 13 *Geo.* 3. *B. S. C.* 227.]

[By apprenticeship under a second indenture, the first being cancelled by master, father, and apprentice. *Rex v. Weddington*, *P.* 14 *Geo.* 3. *B. S. C.* No. 239.]

[By apprentice to a certificate-man, who removes to another parish, if he serves forty days there. *Rex v. St. Peter's*, *P.* 29 *Geo.* 2. *B. S. C.* No. 125. *Rex v. Spotland*, *H.* 5 *Geo.* 3. *B. S. C.* No. 170.]

[Or, tho' the master, after the expiration of the term, gets a certificate to the same parish. *Rex v. Cliftheydon*, *H.* 14 *Geo.* 2. *B. S. C.* No. 56.]

[Or, if the certificate cannot be found, tho' the master said he came by one. *Rex v. Saint Maurice*, *M.* 24 *Geo.* 2. *B. S. C.* No. 106.]

[By apprentice in the parish to which he had formerly, with his father, been certificated, but removed on being chargeable, before the apprenticeship began. *Rex v. Sudbury*, *H.* 28 *Geo.* 2. *B. S. C.* No. 119.]

[By apprentice in a parish to which his grandfather had been long before certificated, and had left it, and had the pauper's father afterwards, who had been never in that parish; for the certificate shall be deemed waived or deserted. *Rex v. Taunton Saint Mary Magdalen*, *T.* 29 & 30 *Geo.* 2. *B. S. C.* No. 129.]

[*N. B.* The case of *Rex v. Sowerby*, is not contrary to this, for it was determined on another point, viz. the indentures not being stamp according to 5 *W. & M.* *B. S. C.* No. 130.]

[By apprentice, son of a certificate-man, and born in the parish to which certificated, and serving apprenticeship in a third parish. *Rex v. Selton*, *H.* 2 *Geo.* 2. *B. S. C.* No. 92.]

[By apprentice to a man certificated from *A.* to *B.* where he resided some years, and thence went to *C.* where he delivered the certificate to the proper officer, and purchased a house for 10 *l.* in which he lived. *Rex v. Bishopside*, *T.* 28 *Geo.* 2. *B. S. C.* No. 122.]

[By apprentice serving five years, tho' the indentures then exchanged, and a subsequent agreement to be apprentice for four years to a third person, but no indenture executed; and service thereupon, which

which the first master knew; settlement with the first. *Rex v. Saint Mary Kalendar*, T. 21 & 22 Geo. 2. B. S. C. No. 95.]

[By apprentice with a second master, whom he serves above forty days with the consent of the first, but without assignment. *Rex v. Framington*, P. 30 Geo. 2. B. S. C. No. 133. *Rex v. Minories*, E. 30 Geo. 3. 3 T. R. 605. S. P.]

[By apprentice married at the time of binding, by forty days' habitation, tho' then being sick he goes away to his father's, with his master's consent, and lives there forty days, the indentures being given up, but not cancelled. *Rex v. Tichfield*, M. 4 Geo. 3. B. S. C. No. 164.]

[By apprentice, where he lives the last forty days with his master; who then bids him go where he will, and work for himself; but the indentures not cancelled, nor delivered up, and he hires himself to several masters. *Rex v. Saint Luke*, T. 5 Geo. 3. B. S. C. No. 174.]

[Where there has been such an agreement between the master and the apprentice to give up the indentures, that to an action of covenant brought by the former, the latter could plead the matter in bar, the indentures are considered as cancelled, so as to enable the apprentice to gain a settlement by hiring and service, tho' the indentures still in fact subsist. *Rex v. Harberton*, H. 26 Geo. 3. 1 T. R. 139.]

[By stat. 31 Geo. 2. c. 11. person bound apprentice by deed, and the duty paid, and resident forty days, cannot be removed because the deed, &c. was not indented.]

[The latter part of the service of an apprentice may be joined to the former, notwithstanding any intervening service. 1 T. R. 281.]

[If an apprentice live with his master forty days in A. then forty days in B. and then one day in A. he is settled in A. *Rex v. Brightelmston*, E. 33 Geo. 3. 5 T. R. 188.]

[An apprentice agreed with his master to purchase the rest of his time, and that the indentures should remain with the master till payment of the sum stipulated, part of which only was paid; before the expiration of the time he served another man, at the recommendation of his original master, above forty days; this was holden to enure as a service under the indentures. *Rex v. Chipping-Warden*, H. 39 Geo. 3. 8 T. R. 108.]

*Birth*.—[By bastard, whether of certificate-man or other, where born. *New Windsor v. White Waltham*, T. 5 Geo. Str. 186. *Fort*. 304. *Rex v. Saint Peter's*, Worcester-shire, P. 8 Geo. 2. B. S. C. No. 9. *Rex v. Helton*, T. 16 Geo. 2. B. S. C. No. 66. *Rex v. Wyke*, T. 19 & 20 Geo. 2. B. S. C. No. 90.]

[The place of birth is *prima facie* the place of settlement. *Rex v. Woodford*, H. 23 Geo. 3. 2 C. Bott. 16. pl. 35. *Rex v. Whixley*, H. 26 Geo. 3. *Ibid*. 17. pl. 36. *Rex v. Heaton Norris*, E. 36 Geo. 3. 6 T. R. 653.]

[But if a certificate takes notice, that the woman is single and pregnant, and promises to provide for the infant she goes with, they are bound by the certificate. *Rex v. Ipsley*, M. 10 Geo. 3. B. S. C. No. 201.]

[By bastard (born in a parish whence the mother had been removed by order, and returned there again) at the mother's settlement. *Landinabee v. Much Birch*, M. 8 Geo. Str. 476. *Sed qu*.]

[Extract

[Extract of register and witness, that one was always considered as the son of *A.* now dead, and *B.* who does not attend, nor send excuse, tho' subpoena'd, sufficient. *Rex v. Creech Saint Michael*, *P. 14 Geo. 3. B. S. C. No. 238.*]

[By *stat. 13 Geo. 3. c. 82.* bastard child born in lying-in-hospital, is not settled in that parish, but follows the mother's settlement. This does not extend to cases where the mother's settlement is not known.]

[Lying-in-hospital must be licensed at quarter-sessions.]

*Certificate-man.*—[A certificate given to a pauper is an indemnity to the parish to which the pauper is going, from the consequences of permitting him to reside there. *1 T. R. 356.*]

[A certificate promising to receive the pauper when *requested*, means only when they shall be *legally* requested, namely, by two justices, when the paupers shall become chargeable. *3 T. R. 44.*]

[If it meant to receive them *before* they became chargeable, it would be void under the *8 & 9 W. 3. c. 30.* for a certificate is binding only when it is conformable to that statute. *Ibid.*]

[But where the parish of *A.* consisted of several hamlets, having separate churchwardens and overseers; and a certificate had been granted by some of them, describing themselves as officers of the *parish at large*, evidence was admitted to shew that they were the officers of the hamlet where the pauper was settled. *3 T. R. 609.*]

[The certificate must be signed by a majority of the churchwardens and overseers. *1 T. R. 775.*]

[Must be signed by the majority of the officers *de facto*, and must be directed to one parish in particular. *Rex v. Wymondham*, *H. 36 Geo. 3. 6 T. R. 552.*]

[By *3 Geo. 2. c. 29. s. 8.* the witness who attests the execution of certificates by the churchwarden, &c. signing and sealing the same, or one of the witnesses, shall make oath before the justices, who by *8 & 9 W. 3. c. 30.* are directed to allow the same, that such witness, &c. saw the churchwarden, &c. sign and seal, &c. and that the names of such witnesses attesting, &c. are of their own proper hand writing.]

[Under this statute an allowance of a certificate, as having been duly executed written in the margin of the certificate and signed by two justices, is alone sufficient proof of the certificate, if above 30 years old, notwithstanding the allowance do not certify the affidavit of one of the witnesses, as to the due execution and attestation. *2 T. R. 466.*]

[If a parish be desirous to get rid of a certificate, it is incumbent on them to shew clearly some matter in discharge thereof; and the court will not *presume* such discharge from other facts. *1 T. R. 241.*]

[A temporary absence for a particular purpose will not discharge the certificate. *Id. 356.*]

[But if the pauper quit the parish to which the certificate is given without any intention of returning, the certificate is at an end. *Ibid. Rex v. Saint Michael's*, *H. 34 Geo. 3. 5 T. R. 526.*]

[If a person formerly settled at *A.* receive a certificate from that parish while living on his own estate at *B.* the certificate is discharged by his subsequent residence on his estate at *B.* *3 T. R. 251.*]



[A second certificate discharges a former one given by the same parish. 3 T. R. 218.]

[By a certificate-man living on copyhold, descended or surrendered by her father to his wife. *Burclear v. Eastwoodyhay*, P. 5 Geo. Str. 163. *Rex v. Shenstone*, M. 32 Geo. 2. B. S. C. No. 149.]

[By certificate-man, the father of whose wife dies intestate, possessed of an estate for 99 years, determinable on the death of the wife, leaving her and five other children, and the certificate-man enters upon and takes possession, and lives upon the estate for 29 years, tho' he (nor any other) ever took out administration. *Rex v. Cold Ashton*, H. 31 Geo. 2. B. S. C. No. 143.]

[By renting farm of 10l. in two parishes, but the house in the parish receiving the certificate. *Saint John's Hertford v. Amwell*, M. 9 Geo. Str. 529. *Case of Stapleford*, P. 4 Geo. 2. Str. 849.]

[By executing for a year, on being legally placed in it, an annual office, tho' not a parochial one, settlement in the parish where he lives. *Saint Maurice v. Saint Mary Kalendar*, P. 8 Geo. 2. Str. 1014. B. S. C. No. 10. *Rex v. Thistleworth*, M. 18 G. 2. B. S. C. No. 81.]

[By making purchase of 30l. value, and living upon it. *Rex v. Stanfield*, P. 16 Geo. 2. B. S. C. No. 72. *Rex v. Doddington*, T. 16 & 17 Geo. 2. B. S. C. No. 75.]

[A certificate is valid, tho' the words *legally settled* be not in it, if there are words tantamount. *Rex v. Hilpertion*, P. 17 Geo. 2. B. S. C. No. 77.]

[So, if it is signed and sealed by two churchwardens and two overseers, where there are six churchwardens and four overseers. *Rex v. Tamworth*, P. 14 Geo. 3. B. S. C. No. 240.]

[Invalid, if not allowed by two justices, pursuant to *stat. 8 & 9 W. 3*. *Rex v. Wooton Saint Lawrence*, H. 8 Geo. 3. B. S. C. No. 187.]

[And so if it is witnessed by two justices, but without word of allowance. *Horncastle v. Boston*, P. 4 Geo. Str. 94. Fort. 301.]

[So, if one witness swears he was present with the other, and saw the churchwardens, &c. sign, and that *his* name is his hand-writing, tho' he does not say the other's name is his hand-writing. *Rex v. Aston Keynes*, H. 13 Geo. 3. B. S. C. No. 225. N. B. The other witness was a marksman, and thirty years had elapsed.]

[It does not bind the parish giving it, unless it be in the terms of the statute. *Rex v. Saint George Southwark*, H. 22 Geo. 2. B. S. C. No. 99.]

[It need not be directed to any parish, nor be delivered to a parish-officer. *Rex v. Saint Nicholas Harwich*, H. 15 Geo. 2. B. S. C. No. 62.]

[A certificate must be delivered to the churchwardens of the certificated parish at the time the person goes to reside in it. *Rex v. Wensley*, H. 33 Geo. 3. 5 T. R. 154.]

[The parties producing, on an appeal at the sessions of a parish, certificate of thirty years date, need not give any account of it; the bare production of it is sufficient. *Rex v. Ryton*, E. 33 Geo. 3. 5 T. R. 259.]

[A certificate-man may gain a settlement in a third parish, for a certificate concerns only the parish giving it, and to whom it is first given, and there it ought to be left. *Rex v. Bishopside*, T. 28 Geo. 3. B. S. C. No. 122. *Rex v. Heptonstall*, T. 10 Geo. 2. B. S. C. No. 20.

Rex

*Rex v. Petham*, M. 14 Geo. 2. B. S. C. No. 54. *Rex v. Sherborne*, P. 15 Geo. 2. B. S. C. No. 65. *Rex v. Silton*, H. 21 Geo. 2. B. S. C. No. 92. *Rex v. Horsley*, T. 28 Geo. 2. B. S. C. No. 123. *Rex v. Saint Peter's Nottingham*, P. 29 Geo. 2. B. S. C. No. 125.]

[If a certificate is given acknowledging a second wife, when there is a first living, tho' the parish knew it not, they are obliged to maintain both and their children. *Rex v. Headcorn*, T. 19 Geo. 2. B. S. C. No. 86.]

[A certificate is *conclusive* upon the parish granting it, only with respect to that parish to which it is granted; so it is *prima facie* evidence as to others. *Rex v. Lubbenham*, E. 31 Geo. 3. 4 T. R. 251.]

[Where A. granted a certificate to B. acknowledging the pauper and his wife to be their parishioners, it is competent to A. as between that parish and C. to shew that the woman supposed to be the pauper's wife had a former husband living at the time of her marriage with the pauper. *Ibid.*]

[But it being stated that a child included in the order was born during the cohabitation of the pauper and his supposed wife, and was baptized as their child, this was holden sufficient evidence of bastardy to settle the child where born, altho' the former husband of the mother was in *England* at the time. *Ibid.*]

[Certificate acknowledging A. and B., and C. their son, as inhabitants, is good for C. tho' a bastard, and the parish knew it not. *Rex v. Tostock*, H. 13 Geo. 3. B. S. C. No. 228.]

[The certificate may extend to an illegitimate child, if the pregnancy of the mother be expressly alluded to. *Rex v. Ipsley*, B. S. C. No. 201. p. 650.]

[Illegitimate children are not within the meaning of the act, being *fili populi*, unless expressly named. *Rex v. Helton*, B. S. C. No. 66. p. 187. *Rex v. Wyke*, B. S. C. No. 90. p. 264.]

[The parish officers by a certificate engaged to receive the certificated person, therein stated to be an unmarried woman, and the child of which she was then pregnant, and all other children she might afterwards have; it was holden that it did not extend to an illegitimate child born several years afterwards. *Rex v. Mathon*, T. 37 Geo. 3. 7 T. R. 362.]

[Certificate-man, or any of his family, tho' born of another wife, and after certificate granted, cannot gain a settlement in the parish to which he is certificated, but by hiring tenement of 10*l.* yearly value, or executing an annual office in the parish. *Rex v. Sherborne*, P. 15 Geo. 2. B. S. C. No. 65. *Rex v. Bray*, H. 19 Geo. 2. B. S. C. No. 88. *Rex v. Buckingham*, H. 25 Geo. 2. B. S. C. No. 112. *Rex v. Letchlade*, H. 28 Geo. 2. B. S. C. No. 121. *Rex v. Alton*, P. 30 Geo. 2. B. S. C. No. 134. N. B. This is not to be understood as preventing their gaining settlement by purchasing 30*l.* value, or by gaining any estate by operation of law.]

[If a certificate-man by devise has free liberty and power to dwell in a house during life, it is a discharge of the certificate, and he gains settlement. *Rex v. Woburn*, T. 14 Geo. 3. B. S. C. No. 244.]

[A certificated person serving an apprenticeship, or otherwise gaining settlement in a third parish, becomes clear of the certificate, and may afterwards gain a settlement in the parish to which he was certificated. *Rex v. Great Torrington*, T. 30 & 31 Geo. 2. B. S. C.

No. 136. *Rex v. Keynsham*, T. 30 & 31 Geo. 2. B. S. C. No. 137. *Rex v. Ashchurch*, H. 31 Geo. 2. B. S. C. No. 137.]

[A certificated person having returned to the certifying parish, and remained there 18 years, a son who was born to him there, being hired and serving for a year in the parish certified to, gains a settlement in that parish. *Doug.* 418.]

[A parish certificate only includes the certificated man, his wife, and those children who live with him, but does not extend to grandchildren. *Rex v. Darlington*, T. 32 Geo. 3. 4 T. R. 797.]

[If a parish certificate be granted to A., and to B., C. and D. his children by name, B.'s residence in the certificated parish is protected by it, altho' he afterwards marry, and live separate from his father. *Rex v. Telferton*, E. 33 Geo. 3. 5 T. R. 258.]

[A parish certificate extends to a wife married after it is granted. *Rex v. Hampton*, E. 33 Geo. 3. 5 T. R. 266.]

[When the son of a certificated person marries, and lives in a house of his own, he ceases to be under the protection of the certificate, and may gain a settlement in the certificated parish by being rated. *Rex v. Heath*, E. 34 Geo. 3. 5 T. R. 583.]

[A certificate granted to the parish of A. in *Norwich*, is discharged by the certificated person serving a year under a yearly hiring in the parish of B. in *Norwich*, tho' the certifying parish engage to receive the pauper when he shall become chargeable either to A. or to any other parish in *Norwich*. *Rex v. Wymondham*, H. 36 Geo. 3. 6 T. R. 552.]

[All the parishes in *Norwich* are consolidated by the *stat.* 10 Ann. c. 16. for the purpose of maintaining their poor out of one joint fund; but as far as respects strangers they are distinct parishes. *Ibid.* *Rex v. Saint Michael's*, H. 36 Geo. 3. 6 T. R. 536.]

[A father, mother, and two younger children, having been removed from A. to B.—B. granted a certificate to A. mentioning the father, mother, and those two younger children; and it was holden that the certificate did not include an elder child of the age of 14, who at the time of the removal was maintaining himself by his own labour, and paying for board in his father's house; it being stated that at the time of removal the parish officers of A. did not wish to remove that child because he could maintain himself. *Rex v. Storrington*, H. 37 Geo. 3. 7 T. R. 133.]

*Estate*.—[By any estate, whether freehold, copyhold, or leasehold, which a man gets by descent or devise, or gift, or marriage, or operation of law, of what value soever, and residing upon it. *Murray v. Grandborough*, T. 4 Geo. Str. 97. *Fort.* 302. *Rex v. Sundriss*, T. 7 & 8 Geo. 2. B. S. C. No. 4. *Rex v. Marwood*, H. 29 G. 2. B. S. C. No. 124. *Rex v. Ingleton*, P. 6 Geo. 3. B. S. C. No. 179. *Rex v. Ilmington*, T. 6 Geo. 3. B. S. C. No. 182. *Rex v. Saint Mary White-chapel*, T. 8 & 9 Geo. 2. B. S. C. No. 17. 1 T. R. 241.]

[A husband may gain a settlement by residing on an estate vested in trustees for the separate use of his wife. 3 T. R. 114.]

By a widow residing on estate wherein she hath right of dower forty days, but she does not communicate the settlement to a second husband nor their children residing there with her. *Rex v. Painswick*, T. 14 Geo. 3. B. S. C. No. 243.]

[But,



[But, where a woman on her marriage with a copyholder of a manor, in which the widows of husbands dying seised are entitled to their free bench, gave a bond that the son of her intended husband by a former wife, should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of the husband the widow delivered up the possession to the son according to the bond, he gained a settlement by residing on it forty days. 2 T. R. 577.]

[Or, tho' the forty days be not successive, or on the estate, but in the parish, at an alehouse, as a guest. *Rex v Sowton*, H. 12 Geo. B. S. C. No. 40.]

[Or, tho' he is only tenant in common with others. *Rex v. Saint Nyotts*, T. 13 Geo. 2. B. S. C. No. 42. Str. 1116.]

[By 9 Geo. c. 7. no person shall be deemed to acquire any settlement in any parish or place, by virtue of any purchase of any estate or interest in such parish or place, whereof the consideration for such doth not amount to the sum of 30*l.* *bonâ fide* paid, for any longer or further time than such person shall inhabit in such estate, and shall then be liable to be removed to such parish or place, where he was last legally settled before the said purchase and inhabitancy therein.]

[Subsequent improvements on a purchase are not to be considered as part of the purchase money under this statute. 1 Bl. Rep. 596.]

[But residence on an estate coming by devise, tho' under the value of 30*l.* gains a settlement, a devise not being a purchase within the meaning of this statute. Doug. 767.]

[Taking a grant of a copyhold with 1*s.* fine, 1*s.* heriot, and 1*s.* rent, is a purchase within this act. 1 T. R. 241.]

[A conveyance from a father to his son in consideration of *natural love and affection* and of 10*l.* is not a purchase within this statute. 3 T. R. 251.]

[Where the consideration expressed in the deed of conveyance was 28*l.* under which the pauper claimed his settlement, *parol* evidence was admitted to prove that 30*l.* was the real consideration. 3 T. R. 474.]

[By purchase of a house for 39*l.* tho' 30*l.* of it was advanced by another by his order, and the premises soon after mortgaged for it, and residence on it for four years, till the mortgagee entred, and had release of the equity of redemption. *Waddington v. Tedford*, P. 8 Geo. 2. Str. 1014. B. S. C. No. 18.]

[By purchase of above 30*l.* tho' great part of the money borrowed, and estate mortgaged for it, and immediately let, the purchaser never lived upon it, but lived in the parish, and was rated to and paid the land tax and has since sold it. *Rex v. Acton Beauchamp*, T. 26 & 27 Geo. 2. B. S. C. No. 116.]

[A. agreed to give a cottage to his grandson on his marriage, but there was no conveyance; the grandson entred, fitted it up at his own expence, and lived in it several years; then the grandfather died intestate, leaving an only child, the mother of the grandson, who never entred on the cottage, or received or demanded any rent for it; then the mother died, leaving an husband, and this her only son. It was holden that the husband was not tenant by the curtesy, his wife never having being seised in fact; and that the son was seised in fee, and consequently that he gained a settlement by residing on the estate

estate forty days. *Rex v. Great Faringdon, E. 36 Geo. 3. 6 T. R. 679.*

[*A.* agreed to purchase a copyhold estate of *B.* for 60*l.* which was then mortgaged to *C.* for 50*l.* paid the 10*l.* and was admitted subject to the mortgage interest in *C.*; he afterwards borrowed 50*l.* of *D.* to pay off *C.*'s mortgage, and on *C.*'s mortgage being satisfied, he mortgaged the estate to *D.* for 50*l.* It was holden that *A.* gained a settlement by residing forty days on the estate. *Rex v. Chailey, T. 36 G. 3. 6 T. R. 755.*]

*Executing.*—[The office of collector of duties on births and burials. *Rex v. Bickham, H. 7 Geo. Str. 411. Fort. 304.*]

[The office of tythingman. *Burlescomb v. Sampford Peverill, H. 9 Geo. Str. 544.*]

[The office of ale-taster in a borough, tho' not a fifth part of the parish. *Rex v. Whitechurch, T. 27 & 28 Geo. 2. B. S. C. No. 117.*]

[Schoolmaster (licensed by ordinary of free grammar-school, and a clerk of a parochial chapel). *Rex v. Preston, P. 9 Geo. 2. B. S. C. No. 24.*]

*Habitation.*—[If a man lives forty days where he is not removeable, he is settled there. *Passim.*]

[When a servant has resided part of the year in one parish and part in another, at different intervals, making, when added, more than forty days in each, his settlement is in the parish where he slept the last night. *Doug. 657. 5 T. R. 188. B. S. C. No. 825.*]

[Except on his own purchase under the value of 30*l.* by *stat. 9 G. c. 7.* he cannot be removed, yet gains no settlement; and so, where a woman whose husband is absent, resides on his estate. *Rex v. Athrop Rooding, M. 30 Geo. 2. B. S. C. No. 131.*]

[By inhabiting on an estate whereof there has been long possession, tho' the title does not appear, at least till the right is determined. *Ashbottle v. Wyley, M. 11 Geo. Str. 608. Rex v. Bitton, M. 9 Geo. 3. B. S. C. No. 194. Rex v. Garway, M. 9 Geo. 3. B. S. C. No. 195. Rex v. Cold Ashton, H. 31 Geo. 2. B. S. C. No. 143.*]

[Where the pauper's father upon his marriage obtained from his father-in-law a spot of ground, tho' without any conveyance, upon which he built a house and enjoyed it during his life, and it afterwards descended to his eldest son, who also enjoyed it (on the whole nearly twenty years) and never received any interruption from the donor or his heirs, or any claim of ownership from them; it was holden that the younger children of the person who built the house could not be removed from that parish. *Rex v. Betterton, H. 36 G. 3. 6 T. R. 454.*]

[By person who is entitled to a distributive share of the money to be raised by sale of an estate, residing on it. *Per Gould J. Rex v. Natland, M. 15 Geo. 3. B. S. C. No. 247.*]

[By residence on a mere equitable estate. *Doug. 631. 767.*]

[If a church-yard lie in two parishes, the sexton may gain a settlement in the one in which he resides, altho' no part of the church lie within that parish. *3 T. R. 118.*]

*Hiring and service.*—[By a general hiring for that is a hiring for a year.

year. *Rex v. Wincaunton*, H. 24 Geo. 2. B. S. C. No. 107. *Rex v. Berwick Saint John*, P. 33 Geo. 2. B. S. C. 160.]

[But a hiring at so much *per week* is not an implied hiring for a year. 2 T. R. 453. 622.]

[If there be any thing in the contract to shew that the hiring was intended to be for a year, there the reservation of weekly wages will not controul that hiring. *Id.* 453.]

[A hiring to serve for 3s 9d. *per week*, with a liberty of parting on a month's notice, is a general hiring, and the pauper serving a year under it gains a settlement. *Rex v. Hampreston*, E. 33 Geo. 3. 5 T. R. 205.]

[If an husbandman serve for a year, it is strong presumptive evidence that he served under a yearly hiring. *Rex v. Lyth*, T. 33 G. 3. 5 T. R. 327.]

[An agreement to live with a person and take care of his child, for which she was to receive meat, drink, and cloaths, in lieu of wages, is a general hiring, and gives a settlement. *Rex v. Worfield*, H. 34 Geo. 3. 5 T. R. 506.]

[If a servant, after having served a year, part of which was under a retrospective hiring, so that no settlement could be gained by it, continue in service part of another year, the justices may presume a hiring for the second year. *Rex v. Hales*, T. 34 Geo. 3. 5 T. R. 668.]

[Under a hiring from *Whitsuntide* to *Whitsuntide*, a service of 365 days, tho' less than the period of the contract in the particular year, is sufficient to give a settlement. *Rex v. Ulverstone*, E. 38 Geo. 3. 7 T. R. 564.]

[But if the payment of weekly wages be the only circumstance, it must be taken to be a weekly hiring. 2 T. R. 453. 5 T. R. 208.]

[An agreement by a daughter to live with her father, and do the offices of a servant for a year, for her board and lodging and other perquisites, is a good hiring for a year, tho' the daughter is to be at liberty to earn what she can by her labour. 2 T. R. 37.]

[By a hiring for a year, from *Whitsuntide* to *Whitsuntide*, if such hiring be according to the usage of the country, tho' the space of time should be less than a year. *Doug.* 440. B. S. C. No. 208.]

So, by a hiring on the day after *Michaelmas* to serve 'till the *Michaelmas* following, "'till *Michaelmas*" being inclusive. 1 T. R. 490. B. S. C. No. 222.]

[By general hiring and year's service, tho' no mention of wages or maintenance, and tho' such servants (postillions in an inn) and their masters think themselves at liberty to part. *Rex v. Stockbridge*, M. 14 Geo. 3. B. S. C. No. 236. *Rex v. Bath Easton*, H. 16 Geo. 3. B. S. C. 257.]

[A. clubbed with B. for three years, (which signifies one person's contracting to serve another for the purpose of being taught some art or trade,) and also agreed to do any work that B. set him about; it was holden that A. gained a settlement by serving B. under this contract for a year. *Rex v. Coltishall*, E. 33 Geo. 3. 5 T. R. 193.]

[By a conditional hiring, with a year's service. *Rex v. Lidney*, T. 6 & 7 Geo. 2. B. S. C. No. 1. *Str.* 950. *Rex v. New Windsor*, H. 8 Geo. 2. B. S. C. No. 7. *Rex v. Atherton*, H. 16 Geo. 2. B. S. C. No. 71. *Rex v. Saint Ebbis*, H. 22 Geo. 2. B. S. C. No. 101.]

[By



[By service in the same farm under successive masters, without any discharge by the old, or agreement with the new. *Rex v. Ivinghoe*, P. 4 Geo. Str. 90. Fort. 317.]

[If there be a hiring for a year, and service for part of that year, in the parish of A. and before the end of the year the servant removes with the master to the parish of B. serves out the year there, is hired to the same master for another year, with an increase of wages and several months longer in B. without any interval, he gains a settlement. *Doug.* 309.]

[And two services, under different hirings may be tacked together, so as to make a sufficient service for a year, even when there has been an interruption between them, and an absence from the master's house for part of a day. *Doug.* 310. 1 T. R. 778.]

[The servant having been hired for and served eleven months for 10 guineas, was told by his master at the expiration of that time, that "he might stay on an end," without mentioning the wages, to which the servant assented; the second agreement was held to be a general hiring, and party serving a year under it gained a settlement. 3 T. R. 76.]

[Service for a year under a hiring "at 3 s. per week the year round" with liberty to go on a fortnight's notice, will give a settlement. *Rex v. Birdbrooke*, E. 31 Geo. 3. 4 T. R. 245.]

[By servant, tho' sick and absent, or absent with leave, or without leave, but received again, or absent without leave, being sick at the end of term, and never returning. *Rex v. Iffip*, P. 7 Geo. Str. 423. Fort. 305. *Rex v. Eaton*, T. 8 & 9 Geo. 2. B. S. C. No. 14. *Rex v. Goodnestone*, T. 19 G. 2. B. S. C. No. 85. *Rex v. Neither Heyford*, P. 32 Geo. 2. B. S. C. No. 152. *Rex v. Christ-church*, P. 33 Geo. 2. B. S. C. No. 158. *Rex v. Maddington*, H. 11 Geo. 3. B. S. C. No. 211. *Rex v. Bray*, P. 11 Geo. 3. B. S. C. No. 214. *Rex v. Richmond*, P. 13 Geo. 3. B. S. C. No. 229. Vide 1 Bl. Rep. 214.]

[A yearly servant, being deprived of his reason forty days before the end of the year, was taken home by his father who lived in another parish, and who received the wages for the whole year; it was holden that the servant was settled in the master's parish, tho' he continued in his father's house for the remainder of the year. *Rex v. Sutton*, T. 34 Geo. 3. 5 T. R. 657.]

[By servant, tho' his master force him away two days before the expiration. *West Heartley v. East Clendon*, T. 8 Geo. Fort. 216. Str. 526.]

[Or, tho' the servant goes away with leave, ten days before the expiration, to see his relations, because he wishes not to be settled there. *Rex v. Frome Selwood*, T. 6 Geo. 3. B. S. C. No. 181. *Rex v. Potter Higham*, T. 11 Geo. 3. B. S. C. No. 216. Sed qu. why he was not settled at *Hardley*?

[By servant where he lives, tho' his master not settled, nor ever living there. *Rex v. Saint Peter's, Oxon and Wycomb*, M. 9 Geo. Fort. 310. Str. 528. *Bishop's Hatfield v. Saint Peter's*, M. 1 Geo. 2. Str. 794. *Rex v. East Ilfley*, M. 13 Geo. 3. B. S. C. No. 223.]

[By servant attending his master on a visit. *Rex v. Saint Peter's, Oxon*, T. 8 Geo. Str. 524. Sed N. it appears that the master had no domicile, but sometimes lived with one daughter-in-law, and sometimes with the other; and where the last forty days' service was, was adjudged the settlement. *Per Ld. Mansfield*, B. S. C. 422.] [By

[By a hiring for a year, and service for a year, tho' the whole year's service is not under the year's hiring, and even tho' some part of it is prior to the year's hiring. *Brightwell v. West Hanning*, H. 1 Geo. Rex v. *Aynhoe*, M. 1 Geo. 2. Ld. Raym. 1511. *Hammer v. Ellefmere*, M. 4 Geo. 2. Str. 878. And tho' an hour intervene between the two. *Rex v. Fifehead*, M. 11 Geo. 2. B. S. C. No. 37. *Rex v. Underbarrow*, H. 6 Geo. 2. B. S. C. No. 175. *Rex v. Spaunton*, P. 15 Geo. 3. B. S. C. No. 249.]

[By hiring and service for a year to spin at 18d. per stone, and find her own victuals and lodging. *King's Norton v. Camdden*, T. 13 Geo. 2. Str. 1139. B. S. C. No. 52.]

[By a hiring by the year to work by the piece, with an implied liberty, from the usage of the place, to be absent when the servant pleases, but not to work for any other master, and service under such hiring, tho' the servant may have absented himself at different times in the course of the year. *Doug.* 333.]

[So, a militia man being hired for a year, with an express agreement that he shall be absent on duty for a month, and in lieu thereof serve a month over the year, gains a settlement without serving the additional month. *Doug.* 391. B. S. C. No. 234.]

[By conditional hiring of a married man, which was confirmed, and all the service after the wife's death without issue. *Rex v. Bank Newton*, P. 31 Geo. 2. B. S. C. No. 145.]

[If a servant be unmarried at the the time when he is hired for a year, he gains a settlement by a year's service, tho' he marry before the service commences. 3 T. R. 385.]

[By hiring for a year and service, tho' the wages paid from time to time, and tho' the servant goes several times, with leave, to work with others, and receives wages for it, only abating to his master *pro rata* of his yearly wages. *Rex v. Beccles*, P. 17 Geo. 2. B. S. C. No. 78.]

[By hiring and service, and forty days' residence, tho' not at one time. *Rex v. Greenwich*, M. 18 Geo. 2. B. S. C. No. 82.]

[Where the last forty days' service are performed, without any new contract, tho' a year's service had been performed in another parish under the hiring for a year. *Rex v. Groscombe*, M. 19 Geo. 2. B. S. C. No. 87.]

[Where the last forty days' service, tho' at a place of public resort, the service ending there. *Rex v. Bath-Easton*, P. 14 Geo. 3. B. S. C. 241.]

[N. B. The difference between this and *Rex v. Alton*, B. S. C. No. 134. is, that there the service did not end at the public place.]

[Servant sometimes at A. where his master resides, sometimes at B. where he has a farm, lives at B. the last forty days successively, but more than forty days in the whole at A. and lodges there the last night; settled at A. *Rex v. Lowness*, P. 16 Geo. 3. B. S. C. 258. *Rex v. Hulland*, E. 21 Geo. 3. Dougl. 657.]

[A yearly servant served forty days in A. then forty days in B. and afterwards returned to his father's house in A. for the three last days of the year, with the master's consent; holden that he was settled in A. *Rex v. Undermilbeck*, M. 34 Geo. 3. 5 T. R. 387.]

[A settlement may be gained by serving a year under different hirings, if one of them be for a year, tho' there be not forty days' service

service under the yearly hiring. *Rex v. Adson, H. 33 Geo. 3. 5 T. R. 98.*

[By hiring and service by an apprentice after his master's death. *Rex v. Eakdring, P. 26 Geo. 2. B. S. C. No. 114.*]

[Or, by parish apprentice, if the indentures are cancelled, he being of age, tho' without the consent of the parish officers. *Rex v. Ecclesball Bierlow, P. 6 Geo. 3. B. S. C. No. 180.*]

[By hiring for a year, tho' at the end of three quarters the servant was discharged against his consent, and the discharge allowed by a justice, (because he had married,) but without order in writing. *Rex v. Hanbury, T. 26 & 27 Geo. 2. B. S. C. No. 115.*]

[If a servant hired for a year give warning eight days before the expiration of the year, to leave his master at the end of it, and the master discharge him on the same day, paying him his full wages, the servant being willing to stay 'till the end of the year; the contract is not hereby dissolved so as to prevent the servant's gaining a settlement; but the discharge is merely a dispensation with the remainder of the service. *2 T. R. 624.*]

[If a yearly servant be discharged four or five days before the end of the year on his master's becoming a bankrupt, and receive the full year's wages, the service is sufficient to give him a settlement *Id. 627.*]

[If a master fraudulently turn away the servant with a view to prevent his gaining a settlement, or *wrongfully* discharge him before the end of the year, that will not defeat the servant's gaining a settlement. *Id. 626.*]

[A master being obliged to leave his house seven days before the end of the year for which he had hired a servant, told her he had no further occasion for her services, and paid her the whole year's wages; the master would otherwise have kept her, and she was unwilling to leave the service; and it was holden that she gained a settlement. *Rex v. Lambeth, E. 39 Geo. 3. 8 T. R. 236.*]

[A *bonâ fide* exception of part of the time, at the time of hiring, will prevent a settlement; but if there be no exception then, a permissive absence afterwards will not prevent it. *2 T. R. 455.*]

[Therefore if a master and servant before *Michaelmas* agree for yearly wages, and the master, while he is taking the money from his pocket to give earnest, tells him that *he shall be absent a fortnight at Michaelmas because of his settlement*, and that he will give him that time to get what he can, to which the servant assents; this is a mere dispensation, and not such an exception out of the original contract as will make the hiring insufficient. *2 T. R. 376.*]

[By hiring for eleven months, and to give in a month's service, and serving accordingly all but three days, and receiving the whole wages. *Rex v. Milwich, T. 30 & 31 Geo. 2. B. S. C. No. 139.*]

[By the last forty days' service with the executor of the original master, in continuance of the original contract. *Rex v. Ladoch, P. 15 Geo. 2. B. S. C. No. 64.*]

[By hiring for three years under certain conditions, and service for six months, then absent for three months, being ill, and then serving nine months, till he was removed by order of justices. *Sed N.* it seems as if the orders were quashed, because they removed the pauper whilst in actual service. *Rex v. Ozleworth, T. 24 & 25 Geo. 2. B. S. C. No. 108.*]

[If



[If a servant live three years in service with the same master, it is evidence from which the justices may infer a hiring for a year, tho' it appear at first that the servant was hired only for part of the year. *Rex v. Long Whatton*, B. R. M. 34 Geo. 3. 5 T. R. 447.]

[By hiring for a year, tho' the servant does not work on Sundays and holidays, by the custom of the country; but that must not be part of the original contract. *Rex v. Saint Agnes*, T. 10 Geo. 3. B. S. C. 202. *Rex v. Buckland Denham*, H. 12 Geo. 3. B. S. C. No. 218.]

[Hiring for a year may be proved by implication, as that A. was hired by B. to serve as under-carter to C. and C. served the year. *Rex v. Nutley*, P. 12 Geo. 3. B. S. C. No. 220.]

[By the son of a certificate-man from under the certificate, hired and serving in a third parish. *Rex v. Horsley*, T. 28 Geo. 2. B. S. C. 123.]

*Marriage.*] It is not incumbent on the persons married to prove that the banns were published, nor does the entry directed to be made (of the banns and marriage, *semb.*) affect the validity of the marriage. *Rex v. Saint Deugreux*, P. 2 Geo. 3. B. S. C. 162. 1 Bl. Rep. 367.]

[The removal of a *feme-covert* is *prima facie* evidence that the husband's settlement is in the parish to which she was removed. *Doug.* 46.]

*Parentage.*—[A child is not emancipated so as to lose the benefit of any settlement his father may gain, 'till 21 or marriage, or 'till he has gained a settlement in his own right, or 'till he has contracted a relation inconsistent with the idea of his being part of his father's family. 3 T. R. 355.]

[The settlement of a child 5 years old, leaving the father's family and living with different relations 'till ten, follows that of the father, if he has not gained any settlement in his own right. 3 T. R. 114.]

[A son 16 years old was bound apprentice in A. for four years, which he served and never afterwards returned to his father's family; the indenture was void for want of a stamp, and the father in the mean time gained a settlement at B.; it was held that the son was not settled in A. by the apprenticeship, and that he was not emancipated, but followed his father's settlement. 3 T. R. 353.]

[The infant son of a person living at A. under a certificate served a year at B. (an extraparochial place) under a yearly hiring, and then returned to A. under 21, where he was hired and served a year; and it was holden that he gained no settlement in A. *Rex v. Collingbourn-Ducis*, H. 31 Geo. 3. 4 T. R. 199.]

[By certificate-man's children in his parish, tho' the woman after his death swears they were never married. *New Windsor v. White Waltham*, T. 5 Geo. Str. 186. *Fort* 304.]

[By a son of ten years' old living with his father at A. tho' the father afterwards without him gains a settlement at B. *Eastwoodhay v. Westwoodhay*, T. 7 Geo. Str. 438.]

[By the children of a widow who gains a settlement after her husband's death. *Saint Katherine v. Saint George*, T. 1 Geo. *Fort*. 218. *Rex v. Woodend*, H. 12 Geo. *Fort*. 328. *S. C. Paulsbury v. Woodon*, Str.

*Str.* 746. *Ld. Raym.* 473. *Rex v. Barton Turfe*, T. 8 & 9 Geo. 2. B. S. C. No. 15.]

[By a legitimate child at his father's settlement, tho' he (the child) was never there. *Eversley Blackwater v. Saint Giles*, H. 10 Geo. For. 320. *Ld. Raym.* 1332. *Str.* 480.]

[By son who has served an apprenticeship, and afterwards works about the country for himself, but comes to his father's when he pleases, (tho' he pays for what he has,) considers it as his home, and has his holiday clothes there. *Rex v. Halifax*, P. 15 Geo. 3. *Ld. Mansfield absent*. B. S. C. 251.]

[By children, of a father, having no settlement at the settlement of the mother. *Rex v. Saint Botolph without Bishopsgate*, H. 28 G. 2. B. S. C. No. 118. *Rex v. Saint Matthew Bethnal Green*, M. 33 Geo. 2. B. S. C. No. 153.]

[By children at their father's settlement after thirty years' cohabitation with the mother, tho' the marriage is doubtful; and the husband shall not be admitted to disprove it. *Rex v. Stockland*, T. 2 G. 3. B. S. C. 163.]

[By children of a certificate-man where he gains a settlement by purchase. *Rex v. Deddington*, T. 16 & 17 Geo. 2. B. S. C. No. 75.]

[If father and mother are removed as man and wife, and the order confirmed, their children born afterwards shall have the father's settlement, and evidence shall not be allowed to shew that the father and mother were not married. *Rex v. Woodchester*, M. 16 Geo. 2. B. S. C. No. 67.]

[Proof of the father's settlement is sufficient to establish the settlement of the son in the same parish, if nothing appear to contradict it. *Rex v. Stone*, M. 35 Geo. 3. 6 T. R. 56.]

[The settlement of a person attainted, acquired before the attainder, is communicated to his children born afterwards. *Rex v. Cardigan*, M. 35 Geo. 3. 6 T. R. 116.]

*Renting*.—[By renting 10*l.* a-year in value, tho' the rent is smaller. *South Sydenham v. Lamerton*, T. 3 Geo. *Str.* 57. *Rex v. Saint Matthew Bethnal Green*, H. 7 Geo. 3. B. S. C. 185. *Rex v. Bilsdale Kirkham*, P. 16 Geo. 3. B. S. C. No. 260.]

[By renting 10*l.* a-year, tho' the landlord is to pay parish rates. *Rex v. Framlingham*, T. 13 Geo. 3. B. S. C. No. 233.]

[The criterion by which the court form their judgment is not the ability of the person coming to reside on a tenement of 10*l.* a-year, for if he be trusted with a tenement of that value, that is sufficient. 1 T. R. 48.]

[By renting an entire tenement of 10*l.* in two parishes, settlement where the house stands. *South Sydenham v. Lamerton*, T. 3 Geo. *Str.* 57. *Rex v. Saint Matthew Bethnal Green*, H. 7 Geo. 3. B. S. C. 185.]

[By renting 9*l.* 10*s.* in one parish, and 3*l.* in another adjacent, (tho' separate tenements,) of the same person, settlement where he lives. *Elsted v. Holliburne*, M. 3 Geo. 2. *Str.* 849. *Vide* 1 T. R. 458.]

[A. occupied a tenement of 10*l.* a-year, and died leaving three children, to two of whom he bequeathed 5*l.* each, and to the latter, whom he made executrix, the residue of his property. A pauper, who

who had before married the executrix, resided on the tenement above forty days, and paid rent for it; and this was holden to gain him a settlement, tho' the wife never proved the will. *Rex v. Netherseal*, *E. 31 Geo. 3. 4 T. R. 258.*

[Where a pauper was possessed of lands of the annual value of 10 *l.* in the parish of *A.* and afterwards for the space of 40 days during the same time occupied a cottage in the parish of *B.* of the annual value of 1 *l.* 10 *s.* under an agreement for the purchase of it for ten guineas, he gained a settlement in *B.* as by residing on a tenement of 10 *l.* a year. *Rex v. Culmstock*, *T. 36 Geo. 3. 6 T. R. 730.*

[By a lease at will, and occupation. *Cranly v. Saint Mary Guilford*, *H. 8 Geo. Str. 502.*

[By renting a coney-warren. *Kinver v. Stone*, *H. 12 Geo. Str. 678. Vide 3 T. R. 772.*

[Where the pauper rented the fishery of a pond, with the spear-fedge, flags and rushes, growing in and about the same for 10 *l.* a year, the court understood that the soil passed with it, and that it was a tenement within the statute 9 & 10 *W. 3. c. 11. 1 T. R. 358.*

[Taking the hay, grafs, and aftermath of a meadow for ten months, at the annual value of 10 *l.* is a taking of a tenement within the 13 & 14 *Car. 2. c. 12.* so as to give a settlement. *2 T. R. 451.*

[A cattlegate is a tenement within the *st. 13 & 14 Car. 2. c. 12.* so as to enable the occupier of it to gain a settlement. *1 T. R. 137.*

[By a prisoner renting a house within the rules, and paying taxes, *Saint Margaret v. Saint Martin*, *H. 5 Geo. 2. Str. 924.*

[By renting a windmill. *Rex v. Butley*, *T. 10 Geo. 2. Str. 1077. B. S. C. No. 33.*

[By renting 10 *l.* tho' it is too dear, tho' he has said it was to gain a settlement, and tho' he is not of ability to stock it. *Rex v. Weston*, *T. 14 & 15 Geo. 2. B. S. C. No. 59.*

[By taking for a year, and living there half a year, and paying the half year's rent. *Rex v. Winterbourn*, *H. 4 Geo. 3. B. S. C. No. 167.*

[By renting tenement of 10 *l.* and paying the whole rent, and living above forty days in part of it worth 40 *s.* without ever occupying the rest, but letting it off to under-tenants immediately. *Rex v. Llandverras*, *M. 7 Geo. 3. B. S. C. No. 184.*

[By renting 10 *l.* whether distinct or entire, whether in one parish or more, settlement where he lives. *Rex v. Sandwich*, *T. 8 & 9 G. 2. B. S. C. No. 13. Rex v. Saint Lawrence Winchester*, *P. 8 Geo. 3. B. S. C. No. 190.*

[But he must absolutely reside in the parish where part of the premises lies. *2 T. R. 48.*

[By renting the moiety of a tenement as tenant at will, where the moiety exceeds 10 *l. per annum*, whether it is taken jointly of the landlord, or whether the original tenant takes in a partner. *Rex v. Duns Tew*, *T. 29 & 33 Geo. 2. B. S. C. No. 128.*

[*A.* agreed with *B.* on *B.*'s taking a farm of *C.* of the yearly value of 120 *l.* to become joint farmer with *B.* in the stock and farm, but there was no agreement between *A.* and *C.*; and it was holden that *A.* who lived with *B.* on the farm more than 40 days, thereby gained a settlement. *Rex v. Seainer*, *H. 36 Geo. 3. 6 T. R. 554*]



[By renting 10*l.* solely, tho' stocked and occupied with a partner. *Rex v. Newnham*, *M.* 14 *Geo.* 3. *B. S. C.* No. 235.]

[By renting tenement of 10*l.* yearly value, tho' it is not taken for a whole year; and forty days' residence. *Rex v. Shenstone*, *P.* 32 *Geo.* 2. *B. S. C.* No. 151. *Rex v. Saint Lawrence*, *Winchester*, *P.* 8 *Geo.* 3. *B. S. C.* No. 190. *Rex v. Stanton under Bardon*, *H.* 6 *G.* 3. *B. S. C.* No. 178. *Rex v. Saint Mathew Bethnal-Green*, *H.* 7 *Geo.* 3. *B. S. C.* No. 185.]

[By renting stable by a job-coachman for the standing of the horses supplied by him to the lessor. *Rex v. Saint Margaret Fish-street*, *H.* 11 *Geo.* 3. *B. S. C.* No. 212.]

[By renting part of a house and furnishing it, tho' only one door and one stair-case used in common with other persons. *Rex v. Saint George Hanover-square*, *T.* 11 *Geo.* 3. *B. S. C.* No. 217. *Sed N.* This was ruled late at night, and no defence made, and seems contrary to the doctrine laid down by Lord *Hardwicke*, that no part of a house can be said to be in the tenure or occupation of a lodger. *Fludier v. Lombe*, *T.* 9 *Geo.* 2. *B. C. H.* 307.]

[(Part of house); but this doctrine is now established. *Rex v. Saint Giles*, *H.* 15 *Geo.* 3. *B. S. C.* No. 248.]

[It is not necessary that money should be paid by way of rent; repairing gates is equivalent. 1 *T. R.* 137.]

[So, where a pauper was permitted by several persons, having a right of common, to occupy a tenement of 10*l.* a-year value, as a reward for his service as a herdsman, it was held that this service was equivalent to a rent. 1 *T. R.* 598.]

[The fact of the pauper's taking a tenement of 10*l.* a-year is sufficient to give a settlement, tho' the lessor may have no title. 1 *T. R.* 358.]

[Where a person renting and residing on a tenement of 10*l.* a-year in *A.* was removed to *B.* by an order of two justices, and afterwards returned to the same tenement without making any new contract, and resided there more than forty days, he thereby gained a settlement, tho' the order of removal was unappealed from: for the contract was not thereby dissolved. 2 *T. R.* 709.]

[Renting a dairy will gain a settlement. *Rex v. Piddletrentbide*, *T.* 30 *Geo.* 3. 3 *T. R.* 772. *Vide infra*, p. 626. *contra.*]

[A pauper rented 20 cows at 3*l.* 10*s.* per ann. each, and agreed with the farmer that they should be fed in particular fields for a certain part of the year, during which time no other cattle was to depasture there; and it was holden that he took a tenement within the meaning of the statute, and thereby gained a settlement. *Rex v. Tolpuddle*, *E.* 32 *Geo.* 3. 4 *T. R.* 671. *Burt v. Moore*, *T.* 33 *Geo.* 3. 5 *T. R.* 329.]

[A right of common in gross is a tenement within the statute. *Rex v. Derfingham*, *T.* 38 *Geo.* 3. 7 *T. R.* 671.]

[In order to gain a settlement by 40 days' residence on a tenement of the yearly value of 10*l.* the party must stand in the relation of a tenant to the premises. *Rex v. South Lynn*, *T.* 34 *Geo.* 3. 5 *T. R.* 664.]

[A pauper rented two farms of the yearly value of 10*l.* in the parish of *A.* and lived for forty days with his family rent-free in one of two separate tenements in *B.* of the yearly value of 35*s.* by the permission

mission of a relation, who occupied the other tenement, received no rent from the pauper, but had all the dung and manure made by his cattle. It was ruled that the pauper gained a settlement in *B.* *Rex v. Fritwell, E. 37 Geo. 3. 7 T. R. 197.*]

[A man had a tenement above 10*l.* a-year in *A.* in which he generally, and his wife and family constantly, resided for several years, but he occasionally slept in *B.* where he had another tenement under 10*l.* a-year; he slept in *B.* upon the whole above forty days, and particularly on the last night, when both the tenancies expired; and it was holden that his settlement was in *B.* *Rex v. Lambeth, E. 39 Geo. 3. 8 T. R. 240.*]

*Taxes.*—[By being rated and paying, for both are necessary. *Rex v. Sarratt, M. 9 Geo. 2. B. S. C. No. 21. Str. 1123. Rex v. Lower Walton, H. 10 Geo. 2. B. S. C. No. 36.*]

[But if the name of a former occupier, who, to the knowledge of the parish officers is dead, be continued in the poor-rate, but the present occupier pays, he shall gain a settlement. *Doug. 564.*]

[Yet where the farm was rated, and the landlord paid the rate, and was allowed it by the tenant, the latter did not gain a settlement, it being stated that the overseer did not know that the tenant resided there; for tho' where a house is rated it is *prima facie* a rate on the occupier, that is not conclusive. *2 T. R. 627.*]

[So, if the rate is thus, "*T. C. or tenant,*" and the tenant pays, he gains settlement; for this is sufficient notice, and it is not necessary that he be expressly named. *Rex v. Painswick, T. 31 Geo. 2. B. S. C. No. 148.*]

[So, where the title of the *poor-rate* is "so much in the pound," and the pauper's name is inserted in the rate, and also his yearly rent, and he pays at the rate of 2*s.* in the pound for his specified rent, tho' nothing be written against his name in the "column of sums assessed," this is a sufficient rating and paying for the purpose of gaining a settlement. *Doug. 621.*]

[A writing is shewn a man on demand of land-tax, he is distrained for it, settled, tho' the original rate not produced. *Rex v. Saint Issy, P. 16 Geo. 3. B. S. C. No. 259.*]

[Tho' the tenement is not of 30*l.* value, if it comes by marriage settlement. *Rex v. Worth, M. 10 Geo. 2. B. S. C. No. 27.*]

[Or, even tho' it be by purchase. *Rex v. Uffculme, T. 30 & 31 Geo. 2. B. S. C. No. 138.*]

[Tho' it is not a parochial tax, (as land-tax,) and tho' it is not for a whole year. *Rex v. Bramley, H. 9 Geo. 2. B. S. C. No. 22.*]

[Tho' the tenant is repaid by his landlord, and that by previous agreement. *Rex v. Chiddingfold, H. 30 Geo. 2. B. S. C. No. 132. Rex v. Fulham, M. 33 Geo. 2. B. S. C. No. 155. Rex v. Openshaw, P. 4 Geo. 3. B. S. C. No. 168.*]

[If the title of a *land-tax rate* be, "an assessment on the inhabitants of the parish of *A.*" and both landlords' and tenants' names are in the rate, but without any words importing which is rated, and the tenant holds by paying a rent certain, clear of all taxes parliamentary and parochial, and pays the rate, he gains a settlement. *Doug. 226.*]

[But tho' a *tenant* has actually paid the land-tax, and his name is in the rate in a column of "occupiers;" yet, if the *landlord's* name

be in a column of "landlords rated," the tenant does not gain a settlement. *Doug.* 226.]

[So, if there be a column of proprietors, and another of occupiers, and it is not specified in the rate which is rated, and the tenant, on paying the land-tax, takes a receipt in which the sum paid is described as "so much assessed on the landlord," the tenant gains no settlement. *Ibid.*]

[Whether the landlord or tenant be rated to the land-tax (both names being in the rate,) is a question of fact to be found by the justices at sessions; and if they state it as a fact, *B. R.* is precluded from considering whether they have drawn a right conclusion, tho' they state all the other circumstances of the case. 3 *T. R.* 505.]

[In a settlement case depending upon the pauper's being rated, the justices at the sessions must state, as a fact, whether the landlord or tenant was rated; and if they only state the evidence of that fact, the court will send the case down to be re-stated. *Rex v. Rainham*, *E.* 33 *Geo.* 3. 5 *T. R.* 240.]

[The pauper being duly rated, and having absconded, his landlord desired the collectors to levy a distress on his goods *lest he* (the landlord) *should lose the money*; in consequence of which they went to the house, when the pauper's daughter said a friend of her father would assist them; they then went to this friend, who gave a guinea to the collectors, and they out of that received the tax; this was held payment of the rate by the pauper. 3 *T. R.* 550.]

[By a tide-waiter rated and paying to land-tax, tho' repaid by the collector. *Rex v. Oakhampton*, *P.* 7 *Geo.* 2. *B. S. C.* No. 3.]

[By a man occupying nothing, but living with his mother an occupier, and he charged as occupier, and paying rates accordingly. *Rex v. Stapleton*, *M.* 10 *Geo.* 3. *B. S. C.* No. 200.]

#### A Settlement is not gained by

*Administrator*.—[Having the remainder of a term in a cottage, unless he takes out letters of administration within that term. *Rex v. Widworthy*, *T.* 10 & 11 *Geo.* 2. *B. S. C.* No. 34.]

[Persons entitled to administration or dower, who reside on the estate without administration granted, or dower assigned, do not gain a settlement. *Doug.* 631.]

*Apprenticeship*.—[By apprentice, where the master keeps shop in one parish and lies in another, and the apprentice in a third. *Rex v. Saint Olave Jewry*, *P.* 3 *Geo.* *Str.* 51. *Sed contra post.*]

[If the duty on apprentices is not paid, in cases when it ought to be paid. *Curenden v. Laland*, *P.* 4 *Geo.* 2. *Str.* 903.]

[Or, if the indentures are not stamped according to 5 *W. & M.* c. 21. *ss.* 11. *Rex v. Holbeck*, *M.* 16 *Geo.* 2. *B. S. C.* No. 69. *Rex v. Llanvair*, *T.* 17 & 18 *G.* 2. *B. S. C.* No. 80. *Rex v. Sowerby*, *H.* 24 *G.* 2. *B. S. C.* No. 130. *Vide* 3 *T. R.* 353. 515.]

[Where no indenture is executed. *Rex v. Stratton*, *P.* 21 *Geo.* 2. *B. S. C.* No. 94. *Rex v. Saint Mary Kalendar*, *B. S. C.* No. 95. *Rex v. Whitchurch Canonicorum*, *T.* 5 *Geo.* 3. *B. S. C.* No. 173. *Rex v. All-saints, Hereford*, *H.* 10 *Geo.* 3. *B. S. C.* No. 203. *Rex v. Kingfwear*, *T.* 16 *Geo.* 3. *B. S. C.* No. 262.]

[By



[By parish apprentice, not party to the indenture, if one of the justices is not said to be of the *quorum*. *Rex v. Woolstanton*, P. 12 Geo. 2. Str. 1110. B. S. C. No. 41.]

[Unless a binding within the act appears. *Rex v. Saint Helen's Abington*, T. 22 & 23 Geo. 2. B. S. C. No. 104.]

[As, if the indenture be assented to by two justices *separately*. 3 T. R. 380.]

[If the master, tho' he had not a certificate, at the time of binding, yet obtains one before the apprentice has served forty days. *Rex v. Westbury*, H. 32 Geo. 2. B. S. C. No. 150.]

[If it appears to have been only by a parol binding. *Rex v. Marwan*, H. 22 Geo. 2. B. S. C. No. 102.]

[By the apprentice's serving another without the privity of his master, who had failed. *Rex v. Puckington*, P. 10 Geo. Fort. 321. Ld. Raym. 1352. Str. 582.]

[Where the apprentice serves without the consent, tho' with the knowledge of the master. *Rex v. Ideford*, H. 16 Geo. 3. B. S. C. No. 256.]

[And a mere recommendation is not sufficient. 1 T. R. 281. 3 T. R. 605. unless it be, that the apprentice shall go to a *particular* person in the same business, and make an agreement with him for his own good; for then, tho' he serve his second master a considerable time (as two months) before the indentures are given up to him, such service with the second master will gain a settlement. 3 T. R. 605.]

[Or, by serving another after the indentures are delivered up, tho' the time is not expired, and the master knows and approves of it, *Rex v. Notton*, M. 9 Geo. 3. B. S. C. No. 193.]

[By being turned over, and serving a certificate-man. *Rex v. Rumsey infra*, P. 9 Geo. 3. B. S. C. No. 198.]

[If an apprentice to a certificate person be assigned to a second master in the same parish, he cannot gain a settlement in that parish by serving the second master. *Rex v. Hinchley*, T. 31 Geo. 3. 4 T. R. 371.]

[If *A.* serve seven years as an apprentice, and there be no indenture, he cannot gain a settlement, either as an apprentice or a yearly servant. *Rex v. Margram*, H. 33 Geo. 3. 5 T. R. 153.]

[An apprentice to the wife of a certificated man, who was married after the certificate was granted, cannot gain a settlement in the certificated parish, by 12 Ann. st. 1. c. 18. *Rex v. Hampton*, E. 33 Geo. 5 T. R. 266.]

[The son of a certificated person cannot gain a settlement in the certificated parish by apprenticeship, tho' the father (to whom the certificate was given) died six months before the expiration of the apprenticeship. *Rex v. Alfreton*, H. 38 Geo. 3. 7 T. R. 471.]

*Certificate-man.*—[By fraudulent hiring of 10*l.* per ann. *Rex v. Saint Nicholas Harwich*, H. 15 Geo. 2. B. S. C. No. 62.]

[By being charged to and paying rates. *Ibid.*]

[By executing an annual office, if not legally placed in it. *Rex v. Wingham*, M. 17 Geo. 2. B. S. C. No. 76.]

[Or, if he does not execute it for a whole year. *Rex v. Fittleworth*, M. 18 Geo. 2. B. S. C. No. 81.]

[By executing the office of schoolmaster, with a salary of 10*l.* *per annum*, which by will was given to the vicar. *Rex v. Milborne*, P. 18 Geo. 2. B. S. C. No. 83.]

*Estate*.—[If there is not residence. *Wookey v. Hinton Blewet*, M. 8 Geo. Str. 476.]

[If the interest in it determines before forty days' residence. *Rex v. West Shefford*, M. 25 Geo. 2. B. S. C. No. 110.]

[If the purchase is under 30*l.* tho' the purchaser is irremovable during the time of inhabiting in the parish. *Rex v. Salford*, H. 4 Geo. 3. B. S. C. No. 166. 1 Bl. Rep. 433. 455.]

[And therefore, his children have no derivative settlement under him in such place. *Ibid.*]

[If the purchase is 19*l.* tho' 15*l.* more is laid out on it, and it is taxed after the rate of a 30*l.* tenement. *Rex v. Dunchurch*, H. 6 Geo. 3. B. S. C. No. 177.]

[Where the contract for the purchase of a copyhold estate was for 39*l.* mortgaged to another person for 32*l.* and the purchaser paid 7*l.* and was admitted to the estate, subject to the mortgage, he did not gain a settlement by it under the 9 Geo. 1. c. 7. 2 T. R. 12.]

[If a man who is insolvent has conveyed his estate to trustees for the payment of his debts, and afterwards, before the trust is performed, gets fraudulently into possession; a residence of 40 days will not gain a settlement. *Rex v. Saint Michael's*, E. 21 Geo. 3. Doug. 630.]

[The mortgagee of several houses after recovering possession in ejectment, permitted the mortgagor to inhabit one of them for a particular purpose; it was held that the latter gained no settlement by such residence, for he was not in possession as mortgagor. *Rex v. Gatherington*, T. 30 Geo. 3. 3 T. R. 771.]

[If A. residing on a cottage of his own, grant it by lease and release to B. in fee, in consideration of 36*l.* with a proviso "that A. shall live in and occupy the said cottage with the appurtenances, as he theretofore had done and then did, for life"; B. takes only a remainder after an estate for life in A. and therefore has not such an interest during A.'s life as will enable him to gain a settlement by residence on the estate. *Rex v. Easington*, H. 31 Geo. 3. 4 T. R. 177.]

*Executing*.—[The office of constable, if not presented at the leet as the custom has been. *Rex v. Winterbourn*, H. 4 Geo. 3. B. S. C. No. 167.]

[Or, tho' sworn in at the leet, if it appears that he does not serve on his own account. *Rex v. Allcannings*, H. 9 Geo. 3. B. S. C. No. 196.]

[Nor, by a curate under a sequestration: the sequestration may be determined at any time. *Rex v. Over*, T. 13 Geo. 3. B. S. C. No. 232.]

*Habitation*.—[By living forty years, attending the leet, amending the highways, having a pew in church, five children, and doing watch and ward, if there is no notice in writing. *Aldenham v. Abbot's Langley*, H. 3 Geo. 2. Str. 853.]

[In an extraparochial place consisting of two houses, or of five houses

houses and farms, if it has not the reputation of a vill, or has not officers. *Denham v. Dalham*, H. 8 Geo. 2. Str. 1004. B. S. C. No. 11. *Stoke Prior v. Grafton*, P. 10 Geo. 2 Str. 1071. B. S. C. No. 31.]

[By living on a freehold out of which one has a rent charge, or a specific legacy, much less where he has only an annuity charged on personal part of which is a leasehold. *Rex v. Stockley Pomeroy*, H. 14 Geo. 3. B. S. C. 237.]

*Hiring and Service.*—[A defective contract of apprenticeship cannot be converted into a contract of hiring and service, so as to give the apprentice a settlement as a yearly servant by serving under it. *Rex v. Laindon*, M. 40 Geo. 3. 8 T. R. 379.]

[Whether a contract be a contract of apprenticeship, or of hiring and service, must depend on the intention of the parties, which is to be collected from the whole of their agreement; and parol evidence may be received to explain the meaning. *Ibid.*]

[If the son of a certificated person serve a year under a yearly contract in the parish, granting the certificate, and then return under age to the father's house for a short time, and then serve another year with another master under a yearly hiring in the certificated parish, he does not gain a settlement in the latter parish. *Rex v. Ingworth*, M. 40 Geo. 3. 8 T. R. 339.]

[When a hiring on the face of it necessarily appears to be for less than 365 days, no usage to consider the time specified in the hiring, as a year, will make it sufficient for the purpose of gaining a settlement. *Doug.* 439. *Vide* 1 T. R. 694. 3 T. R. 250.]

[If there is not an hiring for a year, either expressly, or in law. *Rex v. Dedham*, M. 10 Geo. 3. B. S. C. No. 202. *Rex v. Bradninch*, H. 10 Geo. 3. B. S. C. No. 206. *Rex v. Lowther*, H. 11 Geo. 3. B. S. C. No. 210. *Rex v. Clare*, M. 16 Geo. 3. B. S. C. No. 255.]

[Or, if there is not a reciprocal engagement on the servant to serve. *Ibid.*]

[The contract of hiring, in order to gain a settlement, cannot be presumed. 1 Bl. 206. 3 T. R. 449.]

[An hiring at so much per week is not an implied hiring for a year. *Rex v. Newton Toney*, E. 27 Geo. 3. 2 T. R. 453.]

[A service for a year, under an hiring to serve as an ostler at so much per week, without fixing any time of service, will not give a settlement. *Rex v. Odiham*, T. 28 Geo. 3. 2 T. R. 622.]

[A pauper having lived with his uncle upon charity, was afterwards hired as a yearly servant by another person, whom he served accordingly; at the expiration of which service he returned to his uncle, upon an invitation that if he would come and live with him as before, he would make it better for him than a common service, and lived with him several years in the parish of A. performing the work of a servant in husbandry: during the time he so lived with his uncle, the latter promised that if he continued with him for his life, he would leave him his farm and stock, but he received no wages; and it was holden that he gained no settlement in A. *Rex v. Stokesley*, T. 36 Geo. 3. 6 T. R. 757.]

[By several hirings and services for eleven months each to the same person, with only a week intervening. *Rex v. Haughton*, H. 4 Geo. Str. 83.]



[By a year's service, if two days be on liking *before* the hiring *Coombe v. Westwoodhay*, *H. 5 G. Str.* 143. *Rex v. Ham*, *M. 25 G. 2 B. S. C. No. 109.*]

[By service from the fair after *Michaelmas* to *Michaelmas*. *Rex v. Westwoodhay*, *Ibid. T. 4 G. 2. Fort.* 303. *Rex v. Newton*, *M. 14 G. 2. B. S. C. No. 55.*]

[By hiring for a year, and serving eleven months, tho' he had been a weekly servant for some time before; for two services not *ejusdem generis* cannot be coupled together. *Rex v. Wrington*, *M. 22 G. 2. B. S. C. No. 98.*]

[If the servant goes away twelve days before the expiration, tho' with his master's consent, and he has his whole wages. *Seaford v. Castle Church*, *M. 9 Geo. 2. Str.* 1022. *B. S. C. No. 20.*]

[If the servant is hired for a year, with liberty to be absent the harvest-month, and is accordingly absent. *Rex v. Bishop's Hatfield*, *H. 31 Geo. 2. B. S. C. No. 141.*]

[Or, with liberty to be absent eleven or twelve days in sheep-shearing time, tho' sometimes refused, and sometimes he worked for his master during that time. *Rex v. Empingham*, *M. 15 Geo. 3. B. S. C. No. 246.*]

[If the servant was a parish apprentice, and discharged by his master with his own consent, but without the consent of the parish-officers, he being under age at the time of the discharge, and no explicit leave to a particular service. *Rex v. Austrey*, *H. 31 Geo. 2. B. S. C. No. 142.*]

[If the servant is hired for three years, to work eleven hours a-day on the six working days, and all the rest of the time and *Sundays* to be his own master. *Rex v. Macclesfield*, *P. 31 Geo. 2. B. S. C. No. 146.*]

[Service under a hiring for seven years, to work only 13 hours in the day, (and *Sundays* excepted,) will not give a settlement. *Rex v. Kingwinford*, *B. R. E. 31 Geo. 3. 4 T. R.* 219.]

[A service under a hiring for five years as a colt-shearman, to work twelve hours each day, (without any *express* exception as in the former case,) will not give a settlement. *Rex v. North Nibley*, *M. 31 Geo. 3. 5 T. R.* 21.]

[If the first contract for a year is dissolved, it cannot be connected with a subsequent service. *Rex v. Caverswell*, *P. 31 Geo. 2. B. S. C. No. 147. Rex v. Ross*, *T. 11 Geo. 3. B. S. C. No. 215.*]

[*A.* was hired at *Martinmas* to serve in husbandry for a year at the wages of 8*l.*, in the middle of the year he married, and then agreed to serve his master as a hind for a year from that time, at the wages of 5*s.* per week, and he was to live out of his master's family, but at another farm in the same parish belonging to his master; it was holden that the former agreement was dissolved by the latter, and that *A.* did not gain a settlement by serving under those contracts. *Rex v. Chilton*, *T. 34 Geo. 3. 5 T. R.* 672.]

[The servant a few days before the end of the year for which he was hired, went away in order to get another place for the next year, without asking his master's consent; on his return before the end of the year, the master insisted on turning him away, and offered him his wages up to that time, which he accepted without making any objection. This was holden to be a dissolution of the contract, and  
defeated

defeated the settlement, tho' the servant wished to stay out the year. *Rex v. Claybydon, M. 31 Geo. 3. 4 T. R. 100.*]

[A yearly servant three weeks before the end of his year hired himself to a second master, provided his first would let him go; the former master at first refused, but in a week after he said, "I have got a new servant, you may go now, I have not work for you both," and paid him his year's wages. This was holden to be a dissolution of the contract with the first master, and prevented the pauper from gaining a settlement under it. *Rex v. Thistleton, H. 35 Geo. 3. 6 T. R. 185.*]

[A servant, who had been hired for a year, was taken ill five days before the end of the year, on which he went to his mother's house, and sent to his master for his money, who sent him the whole year's wages, after having deducted 1s. for the time he could not serve, and the servant said he was satisfied. This was holden to be an agreement between the master and the servant to put an end to the contract before the end of the year; and that the servant gained no settlement. *Rex v. Whittlebury, M. 36 Geo. 3. 6 T. R. 464.*]

[As, if the master insist on turning away his servant, and throw down his wages, which the other takes up and then goes away, and after the expiration of six days returns, at his master's request, and serves the remainder of the year, the absence is not purged by the subsequent return. 1 T. R. 101. *Vide 3 T. R. 754.*]

[A servant, who had been hired for a year, was beaten by her master 16 days before the end of the year, on which she desired him to dismiss her from his service, threatening to apply to a magistrate for redress; the master paid her her whole year's wages, and told her she might serve the remainder of the year, but she went away; and it was holden that she gained no settlement. *Rex v. Upwell, M. 38 Geo. 3. 7 T. R. 448.*]

[If a boy of eight years old is taken in out of charity, and no wages or contract, and serves six years; for a contract in such case shall not be presumed. *Rex v. Weyhil, H. 33 Geo. 2. B. S. C. No. 157.*]

[If the servant is hired to be paid by the piece, deducting so much for diet and lodging; for it is not hiring for a year. *Rex v. Saint Peter's Dorchester, M. 4 Geo. 3. B. S. C. No. 165.*]

[If the exception, "to be at his own liberty at all times except usual working hours," is part of the contract. *Rex v. Buckland Denham, H. 12 Geo. 3. B. S. C. No. 218.*]

[By servant attending his master to a place of public resort (as, Scarborough). *Rex v. Alton, P. 30 Geo. 2. B. S. C. No. 134.*]

[A widower having a son who has no settlement of his own, cannot gain a settlement by hiring and service for a year; tho' the son be hired for a year on the same day when the father is hired, and serve that year. *Rex v. New-Forrest, H. 34 Geo. 3. 5 T. R. 478.*]

[A retrospective hiring will not give a settlement. *Rex v. Marton, E. 31 Geo. 3. 4 T. R. 257.*]

*Marriage.*—[If it is not solemnized according to marriage act, 25 Geo. 2. c. 33. as, if the man under age, and not being a widower, is married by licence, without the consent of his father then living. *Rex v. Preston, M. 33 Geo. 2. B. S. C. No. 154.*]

[So,

[So, if celebrated in a chapel erected since that statute, unless cured by 21 Geo. 3. c. 53. altho' marriages *de facto* may have been frequently celebrated there. *Doug. 659.*]

[And bastards are within the meaning of the marriage act. 1 T. R. 96.]

*Parentage.*—[By children in the husband's parish, if he has not lived with his wife. *Saint Andrew's v. Saint Bride's*, P. 3 Geo. Str. 51.]

[By a son grown up, who does not remove with his father to another parish. *Eastwoodhay v. Westwoodhay*, T. 7 Geo. Str. 438. *Saint Michael Norwich v. Saint Matthew Ipswich*, P. 2 G. 2. Str. 831. *Rex v. Bugden*, H. 21 Geo. 2. B. S. C. No. 93. *Rex v. Walpole Saint Peter's*, P. 9 Geo. 3. B. S. C. No. 197.]

[By the children of a woman by a former husband, in her second husband's settlement. *Rex v. Saint Giles in the Fields*, T. 6 & 7 G. 2. B. S. C. No. 2.]

[By children in the place where their father purchased less than 30*l.* tho' he cannot be removed. *Rex v. Salford*, H. 4 Geo. 3. B. S. C. No. 166.]

[A settlement gained by a man some years after his son had left his family and enlisted in the army, is not communicated to the son. *Rex v. Stanwix*, T. 34 Geo. 3. 5 T. R. 670.]

[An adult who leaves her father's house and goes into service, thereby becomes emancipated, and is not entitled to a settlement afterwards gained by her father. *Rex v. Roach*, E. 35 Geo. 3. 6 T. R. 247.]

*Renting.*—[A fraudulent renting of 10*l.* *per annum* will not give a settlement: as, where the pauper rented a meadow for ten guineas a-year, and did not stock it, but let the grafs for the first half year to A. B. for three guineas, who stocked it and paid him, and then the pauper paid his landlord half a year's rent, and then let the mowing of his meadow to his landlord for five guineas, and the after-grafs for two guineas, and at the end of the year received two guineas from his landlord on the balance of accounts: the sessions adjudged this a fraudulent taking, and B. R. affirmed it. 1 T. R. 261.]

[The pasture of a piece of ground of 10*l.* *per annum.* *Rex v. Minchin Hampton*, T. 4 Geo. 2. Str. 874.]

[A house at 10*l.* *per annum*, with covenants to make additions to make it worth that rent which it was not before, and these covenants not performed. *Southwold v. Yoxford*, H. 13 Geo. 2. Str. 1127. B. S. C. No. 47.]

[A tenement of 16*l.* *per annum*, jointly between two persons, tho' it had been let at 20*l.* *Rex v. Marden*, M. 25 Geo. 2. B. S. C. No. 111.]

[A messuage, &c. and feeding for sixteen cows on lands specified, tho' the rent above 10*l.* for it is not a tenement. *Rex v. Lockerly*, H. 25 Geo. 2. B. S. C. No. 113. *supra* 620. *contra.*]

[A tenement of 8*l.* *per annum*, and being joint-tenant for 3*l.* 15*s.* and to pay 4*s.* for some privileges. *Rex v. Kniveton*, P. 33 Geo. 2. B. S. C. No. 159.]

[A farm



[A farm of 44 *l.* for a year, and living there three weeks, and then under a new agreement living in part of the premises not under lease, for a year, nor of 10 *l.* value; for the one cannot be tacked to the other. *Rex v. Delwyn*, *T. 8 & 9 Geo. 2. B. S. C. No. 16.*]

[A residence of 33 days, by a widow on a tenement of 10 *l.* a-year, cannot be coupled with a residence on the same tenement with her husband for 16 days preceding, so as to give her a settlement. *Rex v. South Lynn*, *T. 34 Geo. 3. 5 T. R. 664.*]

[A pauper rented land in *A.* of the annual value of 6 *l.* 10 *s.* 6 *d.* and built on part of it a post wind-mill at the expence of 120 *l.* which, by agreement with his landlord, he was at liberty to remove at pleasure; he let the mill for part of the time at the rent of 9 *l.* per annum; and it was holden that this was not the taking of a tenement of 10 *l.* a-year, and consequently that the pauper gained no settlement in *A.* *Rex v. Londonthorpe*, *T. 35 Geo. 3. 6 T. R. 377.*]

[It was holden that a person, who, after residing on a tenement of 10 *l.* per annum for 29 days, was forcibly prevented from residing there 11 days more, did not thereby gain a settlement. *Rex v. Llanbedergoch*, *H. 37 Geo. 3. 7 T. R. 105.*]

[A residence of 40 days is indispensably necessary for the purpose. *Ibid.*]

[The court of *B. R.* will not infer fraud from the circumstances; fraud must be stated in express terms. *Ibid.*]

[*A.* took a tenement of 10 *l.* per annum, in the parish of *B.*, and after living in it with his family 5 days was arrested and sent to prison in the parish of *C.*; but his wife and children continued in it 7 weeks longer. It was holden that no settlement was gained in *B.* either by the husband or wife. *Rex v. Saint George the Martyr*, *H. 38 Geo. 3. 7 T. R. 466.*]

*Taxes.*—[If he is not rated, tho' he pays. *Rex v. Sarraf*, *M. 9 Geo. 2. B. S. C. No. 21.* *Rex v. Bramshaw*, *M. 10 Geo. 2. B. S. C. No. 29.* *Rex v. Lower Walton*, *H. 10 Geo. 2. B. S. C. No. 30.* *Rex v. Stanlake*, *M. 9 Geo. 2. B. S. C. No. 192.* *Rex v. Saint Cuthbert*, *T. 15 Geo. 3. B. S. C. No. 254.*]

[If a man's name is inserted in a rate, but no sum set against it when made, but next year a sum inserted by churchwarden, and the money paid; no settlement. *Rex v. Warblington*, *T. 14 Geo. 3. B. S. C. No. 245.*]

[If the land-tax assessment expresses that the landlord is rated for lands in the occupation of *A.* tho' *A.* pays and is not repaid, he gains no settlement. *Rex v. Carshalton*, *P. 15 Geo. 3. B. S. C. 252.*]

The workmen in a dock-yard (as *Sheernefs*) gain no settlement in virtue of the money stopt out of their wages for the support of the poor of that ville; for it is not a publick rate or levy. *Rex v. Friendsbury*, *T. 9 Geo. 3. B. S. C. No. 199.*

[A person, who resides in one parish in *Norwich*, and is rated in another, gains no settlement in either. *Rex v. Saint Michaels*, *H. 36 Geo. 3. 6 T. R. 536.*]

[By the *stat. 10 Ann. c. 16.* the parishes in *Norwich* are incorporated for the purpose of maintaining the poor out of one joint fund; but as far as respects strangers those parishes continue separate and distinct, *Ibid.* *Rex v. Wymandham*, *H. 36 Geo. 3. 6 T. R. 552.*]

[The

[The town and parish of *Birmingham* is, for the convenience of the overseers, divided into twelve divisions, under the superintendence of so many overseers respectively, each of whom copies the names out of the general rate into a separate book of such of the inhabitants assessed as are within his district; and it is the custom of the parish for each overseer to add such names to his book as ought to be inserted in the general rate; such addition is not in fact made till the next year; but in the mean while the general rate is from time to time ordered to be collected *with the additions*. It was holden that a person paying the rate, whose name is *afterwards* added in the overseer's book does not thereby gain a settlement; *aliter* if his name be so added *before* he paid the rate. *Rex v. Edgbaston*, *H. 36 Geo. 3. 6 T. R. 540.*]

(B 73.) *Order of removal.*] The proper way for a removal is to make a record of the complaint, and an adjudication, and then grant a warrant for removing, and return the record to the sessions. *1 Sal. 406.*

[If two justices take the examination of a pauper relative to his settlement, but do not remove him, and the pauper afterwards die or become insane, it is a question whether two other justices can remove his family on it. *3 T. R. 707.*]

If the order of the two justices does not pursue the statute, it shall be quashed in *B. R.* as, if it does not shew that one of the justices was of the *quorum*. *R. Sal. 473. 475. 481.*

Or, that the party removed was in danger of being chargeable. *R. Sal. 485. 491. Mod. Ca. 163. Vide ante, (B 72.)*

Or, that complaint was made by the officers of the parish. *R. 5 Mod. 149. Sal. 492.*

Or, that the place to which he is removed was his last settlement. *Vide Sal. 478, 9.*

Or, that the order was made by justices of the county. *R. Sal. 474.*

Or, that the examination, as well as the order, was by two justices. *R. Sal. 488.*

Or, if the order be to the officers of *D.* whether he is removed, to remove him. *R. Sal. 493.*

If there be an order to remove him to *B.* and afterwards *B.* removes him to *C.* without appeal; that admits him settled at *B.* and they cannot remove him to *C.* but upon a subsequent settlement. *R. in B. R. P. 12 W. 3. Semb. Sal. 481. 488.*

But a subsequent settlement shall be intended where it can. *R. Sal. 489. 492.*

If an order to send him to *B.* be affirmed upon appeal, they cannot remove him. *R. Sal. 524. 488. 492. 527.*

If an order be uncertain, it will be quashed: as, to remove *A.* and his family. *R. Sal. 482. 485.*

Or, *A. and his children.* (*Com. 86.*) *R. Sal. 488.*

If it does not mention the ages of the children. *2 Mod. Ca. 337.*

If there be no adjudication of the settlement: as, if it says, *as informed.* *R. Sal. 473. 490.*

Or, *whereas oath has been made.* *R. Sal. 478.*

Or *complaint that A. was the last settlement.* *R. Sal. 479.*

So, it cannot be referred to the opinion of *B. R.* *R. Sal. 486.*

If the first order be defective, it will not be made valid by the order upon appeal. *R. Sal. 482. 608.*

Nor, by the return of the *certiorari*. *R. Sal. 493.*

But *B. R.* will not quash an order nine years afterwards. *5 Mod.*

205.

Nor, if the order be, *that he endeavoured to settle there*, tho' it does not say, *in a tenement under 10 l. per annum*. *R. 5 Mod. 150. Sal.*

493.

Or, that it was *his settlement*; for that is tantamount to *his last settlement*. *Sal. 473.*

Or, does not say that they are justices of the division; for that is only directory. *R. Sal. 473. 480.*

So, if an order for sending to *B.* be reversed upon appeal, that does not conclude to the sending to *D.* *R. Sal. 486. 492. 524.*

So, another parish may afterwards send to *B.* *R. Carth. 516.*

So, an order shall not be quashed for not shewing the cause of the order. *R. Sal. 607. F. g. 254.*

[If the ordering part is by two justices, it is good, tho' the complaint was only to one. *Rex v. Westwood, H. 4 Geo. Str. 73.*]

[To *A.* as the place of his last legal settlement; bad; there must be an adjudication. *Ibid.*]

[Certificate-man cannot be removed, because likely to become chargeable; he is not removeable till actually become chargeable. *Teelby v. Wellerton, H. 4 Geo. Str. 77. Rex v. Hacheston, H. 22 Geo. 2. B. S. C. No. 100. Rex v. Kingswood, P. 29 Geo. 2. B. S. C. No. 126.*]

[A person cannot be removed because he may become chargeable; it must be likely. *Ibid.*]

[Order to remove *A.* and his family quashed as to the family, as too general, but confirmed as to *A.* himself. That he is likely to become chargeable, and that *S.* was the place of his last legal settlement, well enough, on authority of a former case. *Beaston v. Sciffon, M. 5 Geo. Str. 114.*]

[Likely to become chargeable, is sufficient, without saying, to the parish from whence removed. *Rex v. Witham, H. 5 Geo. Str. 142. Maidstone v. Dithing, M. 7 Geo. Str. 393. Rex v. Leofield, P. 12 Geo. Str. 698.*]

[A husbandman who has actually served in the militia, and is married, may be removed to his place of settlement before he becomes chargeable to the parish from which he is removed; for by 26 Geo. 3. c. 107. s. 131. only those militia men, who exercise any trades, are irremoveable. 3 T. R. 133.]

[*A.* and his wife is come into your parish, shall not vitiate order; for it is not necessary to shew they came in; only that they endeavoured to settle. *Rex v. South Marston, T. 5 Geo. Str. 189.*]

[*B. R.* will not make intendments to destroy an order; so if the order recites, that *A.* was hired, and served a year, and gained no other settlement before his death, and therefore remove his widow and her children to that parish; it is to be intended, that he was not married at the hiring, and that her children are by him, and not a former husband. *Ratcliffe Culy v. Exell, M. 6 Geo. Str. 211.*]

[An order of reversal is final between the two parishes only; if it be confirmed, it is final to all. *Little Bitham v. Somerby, M. 6 G. Str. 232.*]

[In



[In an order to remove a certificate-man, it is not necessary to say he had gained no settlement there during his residence there. *Barleycroft v. Cole Overton*, M. 7 Geo. Str. 402.]

[If it says the certificate was allowed according to the act of parliament, it need not say it was attested; for that is implied in it. *Ibid.*]

[Order of removal must be final, and not conditional; and it must be positive, and not *we believe*. *Stallemberg v. Haney*, H. 5 Geo. Fort. 323.]

[If an order to remove from A. to B. be quashed on appeal on the merits, and four years after another order to remove from A. to B. B. R. will not *intend* a new settlement. *Capel v. West Pechem*, M. 12 G. Fort. 327. S. P. *Foston v. Carlton*, T. 9 Geo. Str. 567.]

[One order cannot remove two persons on different settlements. *Chewton v. Compton*, M. 8 Geo. Str. 471.]

[Adjudication of husband's settlement sufficient for wife and child. *Hobey v. Kingbury*, T. 8 Geo. Str. 527.]

[An order to remove a married woman is good, if it does not appear that she is sent from her husband. *Saint Michael v. Nunny*, H. 9 Geo. Str. 544.]

[But she cannot be removed from her husband, even tho' he has no settlement in England. *Rex v. Carleton*, T. 15 Geo. 3. B. S. C. 3. No. 253.]

[An order, removing nurse children to their derivative settlement, without taking notice of the death or settlement of the parents, is good. 1 T. R. 164.]

[In such a case, the evidence of the father may be dispensed with, where his attendance cannot be procured. *Ibid.*]

[A bill of exceptions does not lie to orders concerning settlements. *Rex v. Preston*, P. 9 Geo. 2. Str. 1040. B. R. H. 249. B. S. C. No. 24.]

[Where a man and his children are sent as *actually* settled, it is not necessary to set out the ages of the children; tho' where they are sent consequentially to the father's settlement, it is. *Heptonshall v. Evingdon*, T. 9 Geo. 2. Str. 1047.]

[The examination of the pauper must be by the two justices who sign the order. *Rex v. Wykes*, T. 11 Geo. 2. Str. 1092.]

[If two justices make an order in *January*, and in *April* one of them and another call in the order, and make another to another place, (pending an appeal to the first,) which is afterwards confirmed at an adjourned session, which does not say when the original sessions were held, and therefore void; the first order is good, and the others bad. *Rex v. Harrowby*, P. 10 Geo. 2. B. S. C. No. 32.]

[There must be either an express adjudication, or a plain reference, that the pauper is likely to become chargeable to the parish whence removed. *Rex v. Bourn*, P. 8 Geo. 2. B. S. C. No. 12. *Rex v. Ufculm*, M. 13 Geo. 2. B. S. C. No. 45. *Rex v. Netherton*, M. 13 Geo. 2. B. S. C. No. 46.]

[Adjudication that it was the legal settlement of a wife and daughter, is sufficient, without saying it was the husband's; for the wife could have no other. *Rex v. Higher Walton*, H. 14 Geo. 2. B. S. C. No. 57.]

[But

[But the adjudication is not sufficient, if it is only that *A.* was the settlement of the husband, tho' it does not appear that she is a widow, if she is not removed as his wife, nor the children as *his* children. There must be an adjudication of the settlement of the children or of the mother. *Rex v. Mansfield*, *H. 9 Geo. 2. B. S. C. No. 23.* *Rex v. Great Bedwin*, *H. 8 Geo. 3. B. S. C. No. 188.*]

[In case of a fraud, it must be expressly stated so; for else *B. R.* cannot take it to be so. *Rex v. Weston*, *T. 14 & 15 Geo. 2. B. S. C. No. 59.*]

[If on an appeal from an order of removal, the sessions draw a conclusion, "that the taking a tenement was fraudulent," it is decisive on the court of *B. R.*, tho' the sessions stated all the facts, and referred the consideration of the question to the court. *Rex v. Llanwinio*, *M. 32 Geo. 3. 4 T. R. 473.*]

[A reference to the name of the county in the margin is sufficient. *Rex v. Bourn*, *P. 8 Geo. 2. B. S. C. No. 12.* *Rex v. Uffculm*, *M. 13 Geo. 2. B. S. C. No. 45.* *Rex v. Great Bedwin*, *T. 13 & 14 G. 2. B. S. C. No. 58.* *Rex v. Llanrhydd*, *H. 10 G. 3. B. S. C. No. 204.*]

[An order of removal submitted to, and not appealed from, is conclusive upon the non-appealing parish as against all the world, (but not if it is given up by the parish in whose favour it is made, to save the trouble of appeal). *Rex v. Berkswell*, *M. 15 Geo. 2. B. S. C. No. 60.* *Rex v. Sutton Saint Nicholas*, *T. 21 & 22 Geo. 2. B. S. C. No. 96.* *Rex v. Silchester*, *H. 6 Geo. 3. B. S. C. No. 176.* *Rex v. Llanrhydd*, *H. 10 Geo. 3. B. S. C. No. 204.*]

[If it do not distinctly appear on an order of removal that the justices who made it had jurisdiction, it is a nullity, and not merely voidable; and the parish to which it is directed may object to it at any distance of time, tho' they never appealed against it, and tho' they have acted under it for twenty years. *Rex v. Chilverscoton*, *H. 39 Geo. 3. 8 T. R. 178.*]

[And it is conclusive, not only as against another parish, but even with another township in the same parish. *Rex v. Kirkby Stephen*, *T. 10 Geo. 3. B. S. C. No. 207.*]

[After an order of removal unappealed from, a new settlement can only be gained by some act altogether subsequent to the removal. *2 T. R. 598.*]

[Therefore if a pauper in service at *A.* under a yearly hiring be removed to *B.* and do not appeal, but return in a few days to his master at *A.* be received by him, serve out the year, and receive his full wages, yet he gains no settlement at *A.* *Ibid.*]

[Where a person renting and residing on a tenement of 10 *l.* a-year in *A.* was removed to *B.* by an order of two justices, and afterwards returned to the same tenement, without making any new contract, and resided there more than 40 days, he thereby gained a settlement, tho' the order of removal was unappealed against; for the contract was not thereby dissolved. *Rex v. Fillingley*, *M. 29 Geo. 3. 2 T. R. 709.*]

[But an order of removal unappealed from is only conclusive on those who are mentioned in it; so that if only the father and mother be removed thereby, the question relative to the settlement of their children is still open. *1 T. R. 353.*]

[An

[An order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval. *Rex v. Llanwinio*, M. 32 Geo. 3. 4 T. R. 473.]

[An alteration in an order of removal by one justice in the presence of the other, before it is delivered to the parish officers, does not vitiate it. *Ibid.*]

[An order of removal signed by two justices separately, and in different counties, is only voidable, not void, and the parish wishing to avoid it, must appeal to the next sessions. *Rex v. Stotfold*, E. 32 Geo. 3. 4 T. R. 596.]

[If the adjudication is, that the place is the settlement of the father, the children's ages must be set out; but if it be, that it is the settlement of the children themselves, they need not. *Rex v. Hep-tonstall*, T. 10 Geo. 2. B. S. C. No. 26. *Rex v. Ufculm*, M. 13 G. 2. B. S. C. No. 45. *Rex v. Bowling*, P. 15 Geo. 2. B. S. C. No. 63. *Rex v. Madley*, H. 16 Geo. 2. B. S. C. No. 70. *Rex v. Stanfield*, P. 16 Geo. 2. B. S. C. *Rex v. Normanton*, P. 16 Geo. 2. B. S. C. No. 73.]

[If the original order sets forth, that the pauper is settled at *A. where he lived as a hired servant a year*, it is well enough, for it was unnecessary; but if it had been in a session's order for the opinion of court, it would have been bad, if it had not said he was hired for a year. *Rex v. Madley*, H. 16 Geo. 2. B. S. C. No. 70.]

[No person can be removed from a parish where he has an estate. *Rex v. Hasfield*, P. 13 Geo. 2. Str. 1131. B. S. C. No. 49.]

[And consequently a wife or child cannot be removed from the man's tenement as long as it remains his, tho' he is not there, and tho' his and their settlement is at another place. *Rex v. Leeds*, P. 4 Geo. 3. B. S. C. No. 169.]

[A child is not entitled to remain with its grandmother for nurture, but may be removed from her to its settlement, tho' she is liable to allow for its maintenance. *Ibid.*]

[An order to remove a woman and her children to her husband's settlement, is bad as to the children, for they may be by another man. *Rex v. Normanton*, P. 16 Geo. 2. B. P. C. No. 73.]

[The order must shew, that the justices have jurisdiction; therefore if no county is named in the margin, and the two parishes named are in different counties, and the justices style themselves of the county *aforesaid*, it is bad; for it does not appear they were of the proper county. *Rex v. Stepney*, P. 8 Geo. 2. B. S. C. No. 8.]

[The order must express that one of the justices is of the quorum. *Rex v. Standish*, T. 13 & 14 Geo. 2. B. S. C. No. 50. *Walthamdale v. Great Mitton*. One *whereof*, is good. And *whereof*, bad, for it is insensible. *Ibid.*]

[And it cannot be amended. *Rex v. Kay*, M. 11 G. 2. Andr. 67.]

[It must likewise shew, that complaint was made; for without that they have no jurisdiction. *Rex v. Hareby*, H. 12 Geo. 2. Andr. 361.]

[An order must not be founded on an examination transmitted from other justices. *Rex v. Coln Saint Aldwins*, M. 13 Geo. B. S. C. No. 44.]

[Both justices ought to be present at the *viva voce* examination of the witnesses. *Ibid.*]

[Formerly,



[Formerly a justice could not make an order of removal from a parish where he was an inhabitant and rated. *Rex v. Great Chart*, *M.* 16 Geo. 2. *B. S. C.* No. 68.]

[On occasion of that case was made the *st.* 16 Geo. 2. *c.* 18. which authorises justices to act originally in parishes where they are rated, but not on an appeal.]

[And the sessions have no power to make an original order of removal. *Rex v. Margam*, *E.* 27 Geo. 3. 1 *T. R.* 776.]

[A servant cannot be removed from his service. *Semb. Rex v. Oxleworth*, *T.* 24 & 25 Geo. 2. *B. S. C.* No. 108. Yet *Lee Ch. J.* in *Rex v. Fittleworth*, *M.* 18 Geo. 2. *B. S. C.* No. 81. says, there is no case to prove that servants are not removable during their service, and that he should very much doubt it.]

[A certificate-man actually serving an annual office may be removed on becoming actually chargeable. *Rex v. Fittleworth*, *M.* 18 Geo. 2. *B. S. C.* No. 81.]

[A wife and children may be removed without the husband, to his settlement, if they, and not he, are the intruders. *Rex v. Ironacton*, *M.* 14 Geo. 2. *B. S. C.* No. 53.]

[Child of a certificate-person asking relief for itself only, that only can be removed. *Semb. per Aston J.* *Rex v. Framlingham*, *T.* 13 G. 3. *B. S. C.* No. 233.]

[When relief was given to a son and grandson, living in a separate house from the father, it was held to be no ground to remove him and his other children living with him: but that part of the family only which was chargeable. 3 *T. R.* 44.]

[If a parish lies in two counties, *A.* and *B.* and there is no overseer for the part in *A.* but an overseer for the part in *B.* and churchwarden for the whole parish; a person having gained settlement in the part in *A.* may be removed there, and delivered to the churchwarden. *Rex v. Mereval*, *H.* 10 Geo. 3. *B. S. C.* No. 205.]

[An adjudication that the paupers have become chargeable, is good; for it imports the present tense; and adjudges that they are so at the time of making the order. *Rex v. Honiton*, *P.* 11 Geo. 3. *B. S. C.* No. 213.]

[If a pauper is removed by order from *A.* to *B.*, *B.* gives notice of appeal, on which *A.* takes him back, and gets their order confirmed at sessions nevertheless; and next session set both aside as fraudulent; *B. R.* will quash the first order as properly quashable, and will intend it was late served, as the appeal was at next sessions but one; and quash the order of confirmation, as not being on appeal, and consequently without jurisdiction; (*Q. de ceo*, & vide *Rex v. Woodchester*, *M.* 16 Geo. 2. *B. S. C.* No. 67.) and will quash the latter part of the second part of the second sessions' order, that rescinded the confirmation, as not being properly before them. *Road v. North Bradley*, *T.* 15 G. 2. *Str.* 1168.]

[By *stat.* 13 Geo. 3. *c.* 82. woman and child removed from lying-in-hospital to her parish within twenty miles, the expence to be paid by that parish.]

(B 74-) *Appeal.*] By the *st.* 13 & 14 *Car.* 2. 12. the party aggrieved may appeal to the justices of the county at the next quarter-sessions. By the *st.* 3 & 4 *W. & M.* 11. to the justices of the place whence

whence removed. But by the *st. 8 & 9 W. 3. 30.* the appeal shall be to the justices of the county, division, or riding, and not elsewhere. *R. Sal. 490.*

[If the parish to which a pauper has been removed is at such a distance that there is not time to lodge an appeal at the *quarter sessions* immediately subsequent to the removal, the *justices* are bound to receive it at the sessions next ensuing, this being the true construction of this statute. *Doug. 192.*]

[An appeal against an order of removal may be entred at the next sessions but one after the order is executed, if there be not a reasonable time between the execution of the order and the next sessions to make inquiries respecting the pauper's settlement. *Rex v. Flintshire, E. 37 Geo. 3. 7 T. R. 200.*]

An order upon appeal is final, tho' the statute does not say so. *Per Cur. P. 4 W. & M.*

An appeal *ad generalem sessionem*, omitting *quartermalem*, is not good; *Per Holt.* But it shall be intended; *Per two J. P. 4 W. & M. Vide Carth. 222. R. Sal. 474. 476.* not to be good.

If an order be repealed upon appeal, a child born in the parish to which its mother was removed by the order, shall be sent with the mother to the other parish. *1 Sal. 121, 2. Sal. 474.*

After an order confirmed upon an appeal, if the party goes to another parish, he shall be removed upon an original order. *R. Sal. 481. 489.*

If an order be quashed upon appeal, it cannot be afterwards confirmed at the same sessions; for the court has executed its authority. *R. 5 Mod. 396. Cont. Sal. 494. R. cont. Sal. 607. (Vide Sal. 477. Comb. 418.)*

[If there be an appeal to the next sessions, it may be adjourned to a subsequent one. *Sal. 605.*]

[Where the quarter-sessions are holden at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original sessions, but before the adjourned sessions, an appeal at the next ensuing adjourned sessions is in time, and ought to be received. *Rex v. Suffex, H. 37 Geo. 3. 7 T. R. 107.*]

An order by the sessions must appear to be upon appeal. *Sal. 479. Carth. 58.*

The sessions cannot make an order to another to determine, tho' by consent. *R. Sal. 477.*

The sessions upon an appeal cannot send to a third parish. *R. Sal. 475.*

The sessions cannot supersede an order of two justices; for they shall only quash, or affirm. *Sal. 472.*

By the *st. 8 & 9 W. 3. 30.* justices of peace at quarter-sessions on an appeal about a settlement, or proof of notice of it by a proper officer to the churchwardens or overseers, shall award such costs as they think fit to him for whom the appeal went, or notice was given: and if the party to pay costs live in another county, a justice of peace of that county, on proof of a true copy of such order, shall by warrant levy such costs by distress and sale, &c. and for want of distress, by commitment for twenty days to prison.

[Two

[Two justices may supersede their own order of removal of a pauper, soon after the making, and reciting they were surprised. *Pancras v. Rumbald, Str. 6.*]

[An order confirmed at sessions, whether on an appeal or for want of appeal, is conclusive as to all the world; and with respect to children born afterwards, as well as the parents. *Rex v. Cirencester, H. 8 Geo. 2. B. S. C. No. 6. Rex v. Woodchester, M. 16 Geo. 2. B. S. C. No. 67. Rex v. Saint Mary Lambeth, E. 36 Geo. 3 T. R. 615.*]

[If discharged or quashed on the merits, (*secus* if quashed for want of form,) it is conclusive between the two contending parishes, but not as to others. *Ibid. Rex v. Bradenham, P. 29 Geo. 2. B. S. C. No. 127. Rex v. Bentley, P. 30 Geo. 2. B. S. C. No. 135. Rex v. Saint Andrew Holborn, E. 36 Geo. 3. 6 T. R. 613.*]

[But this is to be understood only where the circumstances remain the same, and not where any new cause of removal has arisen; as, if an order to remove a certificate-man *likely* to become chargeable is quashed, yet he may be afterwards removed, if *actually* chargeable. *Ibid. Rex v. Osgathorpe, P. 19 Geo. 2. B. S. C. No. 89.*]

[A vagrant pass-warrant unappealed from has not the same effect as an order of removal unappealed from. *Rex v. Stanfield, P. 16 Geo. 2. B. S. C. No. 72. Rex v. Upmiedon, P. 16 Geo. 2. B. S. C. No. 74.*]

[Appeal to quarter-sessions does not lie from a vagrant-pass. *Rex v. Ringwould, T. 16 Geo. 3. B. S. C. No. 263.*]

[Nor, from an order of justices for the relief of a pauper. *Doug. 331. 317.*]

[If an order is quashed on appeal, it is not necessary to say, at the appeal of the party grieved. *Rex v. Aldmanbury, T. 4 Geo. Str. 96. Fort, 301.*]

[If an order of removal of two justices (*quorum unus*) be quashed by an order of sessions, reciting that they had perused the charter of *A.* and it did not appear *thereby* that either of the two justices were of the *quorum*, and therefore, &c. the order of sessions shall be quashed, for the want of jurisdiction is not sufficiently averred; the justices might have it, tho' it did not appear by the charter of *A.* *Albrighton v. Skipton, P. 6 Geo. Str. 300.*]

[The sessions may appoint what notice shall be given upon appeals, and dismiss appeal for want of it. *Anon. T. 6 Geo. Str. 315.*]

[Under the *Stat. 13 Geo. 3. c. 78. s. 19.* power is given to the party grieved to appeal, against an order of justices for turning a road, to the next sessions, he giving ten days' notice of appeal before the sessions, if there be time; if not, to appeal to the following sessions on giving like notice. If therefore the appellant has no notice of the proceeding of the justices ten days before the sessions, he cannot appeal to those sessions, but must wait till the following sessions. *Rex v. Justices of Staffordshire, M. 37 Geo. 3. 7 T. R. 81.*]

[But the justices are bound to receive an appeal from an order of removal, if tendered at the next quarter-sessions, altho' no notice of an appeal has been given. *Doug. 191.*]

[Yet they are not bound to receive and adjourn the hearing of an appeal against an order of removal, at the next sessions, if they think the appellants had sufficient time to be prepared to try it, and to give notice to the respondents. *3 T. R. 150.*]



[If an order of removal be executed three days before the sessions in a parish twenty miles from the place where the sessions are holden, and there is no appeal to those sessions, the justices are not bound to receive an appeal at the next sessions. *Rex v. Herefordshire, M. 39 Geo. 3. 3 T. R. 504.*]

[By an inclosure act an appeal was given to the next sessions within six months after the cause of complaint; an appellant moved the court of sessions (in due time) to receive him and respite his appeal to the next sessions, which was refused; and this court would not grant a *mandamus* to the justices at the sessions to receive it. *Rex v. Derbyshire, M. 32 Geo. 3. 4 T. R. 488.*]

[An appeal against a conviction on the *stat. 24 Geo. 3. c. 31.* for not entring horses, &c. must be to the quarter-sessions next after the conviction, and not after the EXECUTION. *Proser v. Hyde, B. R. M. 27 Geo. 3. 1 T. R. 414.*]

[The appeal must be at the next sessions after the removal, not after the date of the order. *Rex v. Norton, P. 2 Geo. 2. Str. 851.*]

[Where there is a general order of two justices good on the face of it, and the party appeals to the sessions, and they make an order specially stating the case, the court will take the special case to be the foundation of the first order, and determine on it accordingly. *Rex v. Reading, M. 8 Geo. 2. B. R. H. 79.*]

[The court will take notice of facts stated in an order of sessions, tho' the order be bad. *Ibid.*]

[The sessions may, by *stat. 5 Geo. 2. c. 19.* amend defects in form, but not in substance, nor any thing that requires examination. *Rex v. Great Bedwin, T. 13 & 14 Geo. 2. B. S. No. 58.*]

[Thus, if it is not said that one of the justices is of the *quorum*, or that it is on the complaint of the overseers, or that the pauper (a certificate-man) is become actually chargeable, it cannot be amended. *Ibid.*]

[An appeal must be continued by adjournment, notwithstanding a conditional reference to the next judge of assize, or the sessions cannot take it up again. *Rex v. Heddingham Seible, M. 11 Geo. 2. B. S. C. No. 35.*]

[If an order is made at an adjournment, it must set forth when the original sessions were holden. *Rex v. Heptonstall, T. 10 Geo. 2. B. S. C. No. 26.*]

[The sessions is not obliged to state a case specially; nor will the court of B. R. send a general order of sessions back to have the case more fully stated, nor order the return to be amended, by inserting the state of the case; nor does a bill of exceptions lie. *Rex v. Oulton, M. 9 Geo. 2. B. S. C. No. 19. Rex v. Preston, P. 9 Geo. 2. B. S. C. No. 24. Rex v. Normanton, P. 16 Geo. 2. B. S. C. No. 73. Rex v. Mayfield, H. 31 Geo. 2. B. S. C. No. 144.*]

[Nor, a special order without consent. *Rex v. Wyke, T. 19 & 20 Geo. 2. B. S. C. No. 90.*]

[But the court of B. R. will order the sessions to enquire into a fact which appears doubtful on the original order of removal, even tho' the sessions have stated no case for the opinion of the court. *1 T. R. 775.*]

[But the court will, by consent of both sides, quash all the orders for insufficiency, in order to have the case more fully stated. *Rex v. Himley, M. 11 Geo. 2. B. S. C. No. 36.*]

[The sessions should state the fact, and not the evidence of the fact. *Rex v. Mariley*, T. 11 & 12 Geo. 2. B. S. C. No. 38.]

[Where the sessions adjudge a place to be a vill by reputation as a substantive fact, the court of B. R. is precluded from going into the question; notwithstanding the sessions state all the evidence particularly, on which they formed their opinion. *Rex v. Ronton Abbey*, H. 28 Geo. 3. 2 T. R. 207.]

[If the original order is for A. B. his wife, and C. and D. their children, and the sessions quash it as to the said B. and the said children, (omitting *his wife*, and *their children*,) B. R. will send it back to be more fully stated. *Rex v. Cuckfield*, P. 22 Geo. 2. B. S. C. No. 103.]

[And if it appears likely that there is a mistake or omission in stating the case, the court will send it back to be amended, notwithstanding the most vehement opposition. *Rex v. Hitcham*, H. 33 G. 2. B. S. C. No. 156.]

[And if the order amended on new evidence be affirmed, yet the recognizance shall be discharged. *Rex v. Hitcham*, T. 33 & 34 Geo. 2. B. S. C. No. 161.]

[But the court will not send a case down to the sessions to be re-stated on a mere formal objection, if enough appear to enable them to decide according to the merits of the case. *Rex v. Middlezoy*, T. 27 Geo. 3. 2 T. R. 41.]

[If a sessions' case be sent down to be re-stated, and the prosecutor abandon it when it is returned, the court of B. R. will discharge his recognizance for the costs given under the *stat. 5 Geo. 2. c. 19. s. 2.* but if he dispute the amended order they will not. *Rex v. Edgeworth*, H. 31 Geo. 3. 4 T. R. 218.]

[If two justices remove a man to A. the order of sessions quashing it is good, tho' it states that he lived there, if it does not say he was settled there, and tho' it states that he came afterwards to B. where he did not afterwards gain a settlement, but had a derivative one there before; for they do not give his going to B. as a reason. *Rex v. Lower Swell*, M. 31 Geo. 2. B. S. C. No. 140.]

[An appeal from an order of removal made by borough-justices must be to the quarter-sessions of the county; for the quarter-sessions of a borough have no jurisdiction in it. *Rex v. East Donyland*, T. 8 Geo. 3. B. S. C. No. 191.]

[The sessions may state, that it appears to them that a person was bound apprentice, tho' the indenture is not produced to them. *Rex v. East Knoyle*, T. 13 & 14 Geo. 2. B. S. C. No. 51.]

[Sessions cannot order costs of maintaining pauper to attend the event of a cause. *Rex v. Great Chart*, M. 16 Geo. 2. B. S. C. No. 68.]

[If the facts are not sufficiently stated, B. R. will affirm the order, *Rex v. Saint George Hanover-square*, T. 21 & 22 Geo. 2. B. S. C. No. 97.]

[By 17 Geo. 3. c. 106. an appeal is given on certain conditions from a conviction by a justice of the peace, to any quarter-sessions to be holden within six months from such conviction: if, on this statute the appellant lodge his appeal and the court dismiss it without entering into the merits, because the previous conditions have not been complied with, and confirm the conviction, such judgment is conclusive,

elusive, and the party cannot lodge a second appeal from the same conviction, tho' within six months. 3 T. R. 776.]

[The sessions, on stating a special case, must determine whether a marriage was by a clergyman or not; if they do not, the order will be quashed for such imperfect state. *Rex v. Luffington*, P. 17 G. 2. B. S. C. No. 79.]

[When the expression is not clear, they shall be intended to have done right. *Rex v. Mayfield*, H. 31 G. 2. B. S. C. No. 144.]

[If both parties agree to refer the matter to the opinion of the judge of assize, B. R. will not enter into it. *Rex v. Natland*, M. 15 Geo. 3. B. S. C. No. 247.]

[Sessions' cases must be set down in the crown paper, and copy of order left with junior judge two days before argument. *General Rule*, Hil. 15 Geo. 3.]

(B 75.) *Officer or party refusing, &c.*] By the *st.* 13 & 14 Car. 2. 12. if the person removed, &c. refuse to go, or come back of his own accord to the parish, any justice of peace may send him to the house of correction; and if the churchwardens and overseers of the parish, to which he is sent, refuse to receive and provide for him, any justice of peace may bind them to the quarter-sessions or assizes, there to be indicted for contempt.

By the *st.* 3 & 4 W. & M. 11. churchwardens and overseers refusing to receive him, &c. on proof by two witnesses before a justice of peace of the county, &c. to which sent, forfeit 5 *l.* to the poor of the parish whence removed, to be levied by distress and sale, and for want of distress by commitment for forty days.

#### (B 76.) Vagabonds, &c.

(B 76.) *Who are.*] By the *st.* 39 El. 4. (whereby all former statutes for punishment of rogues, &c. are repealed); (1.) all persons calling themselves scholars, going about begging; (2.) all seafaring men pretending losses at sea; (3.) all idle persons, begging, using unlawful games or plays, or pretending palmistry, fortune-telling; (4.) all proctors, procurers, patent-gatherers, or collectors for gaols, or hospitals; (5.) all fencers, bearwards, players of interludes wandering, unless authorised by a peer (*vide infra*); (6.) all jugglers, tinkers, pedlars, and petty chapmen wandering; (7.) all wanderers able to work, and refusing to work at the wages usual in those parts, and not having to maintain themselves; (8.) all out of gaol begging for fees, or otherwise; (9.) all wandering and begging, pretending losses by fire, or otherwise; (10.) all wandering, (not felons,) pretending to be *Egyptians*, or in their habit or attire, shall be deemed rogues, vagabonds, and sturdy beggars, and punished as such. *Vide the st.* 12 Ann. 23.

By the *st.* 5 El. 4. a servant taken with a counterfeit testimonial shall be whipt as a vagabond.

So, by the *st.* 43 El. 3. a soldier, or mariner, begging, or counterfeiting a certificate.

By the *st.* 1 Jac. 7. all glass-men wandering, (tho' by the *st.* 39 El. 4. it is used by three justices, and not begging, they were excused,) shall be deemed rogues; and no authority from a peer shall excuse any person from the punishment of rogues.

By



By the *st. 7 Jac. 4.* persons able to work, who run away and leave their families to the parish, shall be deemed and punished as incorrigible rogues: and if any such threaten to run away, on proof by two witnesses on oath before two justices of the division, unless he or she find surety to discharge the parish, shall be sent to the house of correction, and dealt with as a rogue, and not delivered till the next meeting of the justices, or the quarter-sessions.

By the *st. 13 & 14 Car. 2. 12.* a person sent by two justices of peace to his place of settlement, and returning of his own accord, any justice of peace may send him to the house of correction to be punished as a vagabond.

A person who travels within his own county, to sell wares in private houses out of fairs and markets, is a vagrant pedlar within the *st. 39 El. R. 2 Cro. 577. 2 Rol. 172.*

If he wander, tho' he be not taken wandering. *2 Rol. 172.*

[By *st. 17 Geo. 2. c. 5.* idle and disorderly persons are,]

[All who threaten to run away and leave their wives or children to the parish—who unlawfully return to the place whence removed by order of justices, without bringing certificate from their own parish—who, not having wherewith to maintain themselves, live idle, and refuse to work for the common wages of the place—who go about begging, or gathering alms in the place where they dwell.]

[By *st. 2.* rogues and vagabonds are,]

[All who go about as patent-gatherers, or gatherers of alms, under pretence of loss—who go about as collectors for prisons—fencers and bear-wards—common players of interludes—who for gain represent any stage-entertainment, not being authorised by law—minstrels, jugglers—persons pretending to be gypsies, or wandering in the form of *Egyptians*, or pretending to have skill in physiognomy, palmistry, or like crafty science, or pretending to tell fortunes; or using any subtle craft to deceive and impose on any of his majesty's subjects, or playing or betting at unlawful games or plays—who run away and leave their wives and children, whereby they become chargeable to any place—petty chapmen wandering abroad, not licensed or otherwise authorized by law—persons wandering abroad, lodging in ale-houses, barns, out-houses, or the open air, not giving good account of themselves—persons wandering abroad and begging, pretending to be soldiers, mariners, seafaring-men, or pretending to go to work in harvest—other persons wandering abroad and begging.]

[By *st. 1.* persons apprehended begging in their own parish, and resisting or escaping, are liable to the same punishment as rogues and vagabonds.]

[*st. 3.* except soldiers, with certificate from their officers, or the secretary at war, and mariners and seafaring-men with writing under hand and seal of justice, mentioning the time and place of landing or discharge, the place to which such soldier or mariner is to pass, the names of the chief places thro' which, and time of their passage, while they continue in the direct way, and during the time; or persons going to work in harvest, with a certificate signed by the minister and churchwarden, or overseer of the place they inhabit, declaring they have a dwelling there.]

[By *st. 4.* incorrigible rogues are,]

R r 4

[All

[All end-gatherers, offending against *stat. 13 Geo. 1. c. 23.* being convicted of such offence—persons apprehended as rogues and vagabonds escaping, or refusing to go before a justice, or to be examined before him, or to be conveyed by a pass after-mentioned, or knowingly giving false account of themselves on such examination, after warning given them of their punishment—rogues and vagabonds escaping from house of correction before the term for which committed is expired—persons punished as rogues and vagabonds, and discharged, committing any of the said offences.]

[A soldier who leaves his wife and children chargeable, and is himself billeted in another parish, is not a rogue and vagabond within this act; therefore, if committed as such, must be discharged on *habeas corpus.* *Soldier's Case, T. 25 & 26 Geo. 2. 1 Wils. 331.*]

[Whether a wife removed with her husband, and returning with her husband to the parish whence removed, can be committed with her husband? *Qu. Mr. Norton* had certificates that it was the practice; *Mr. Clayton* had known children committed. *Baldwin v. Blackmore, P. 31 Geo. 2. 1 B. M. 595.*]

[A commitment of a person so returning to the house of correction till discharged by due course of law, is illegal; by *13 & 14 C. 2. c. 12.* it must be, to the house of correction, there to be punished as a vagabond; or, to a public workhouse, there to be employed in work and labour: and by *17 Geo. 2. c. 5.* it must be to the house of correction, there to be kept to hard labour for any time not exceeding one month. *Ibid.*]

[The justice ought to convict, before he commit. *Semb. Ibid.*]

[By *stat. 25 Geo. 2. c. 36.* every place for public dancing, musick, &c. within twenty miles of *London*, unlicensed by four justices at *Michaelmas* quarter-session, is a disorderly house or place, and constable with warrant may seize persons there, to be dealt with according to law.]

[Licensed house shall have inscription, *licensed, &c.* and not open till five afternoon.]

[Persons behaving as master or mistress, or as having the care, government or management of a bawdy-house, gaming-house, or disorderly house, shall be deemed the keeper thereof.]

(B 77.) *Who not.*] But by the *st. 5 El. 4.* persons having no harvest in their own town or county, may repair, having a testimonial from a justice of peace of the same place, to another town or county, only for hay or harvest work.

By the *st. 39 El. 4.* person travelling, without begging, by licence of two justices of peace of the county where he dwells, and provision sufficient for the time limited by such licence for his travel, stay, and return, may go to the *Bath*, or to *Buxton*.

And sea-faring man, suffering shipwreck and wanting relief, and having a testimonial of a justice of peace, shewing the place and time of his landing, the place of his birth or dwelling, and the time for his passage thither, may within that time beg in his direct way home.

And children under seven years old shall not be adjudged vagabonds.

[Child under fourteen cannot be removed as a vagabond, by *stat. 12 Ann. c. 23. Rex v. King's Langley, T. 11 Geo. Fort. 323. Str. 631.*]

By the *st.* 39 *El.* 17. a soldier or mariner, having licence from a justice of peace, may ask relief in his direct way home during the time of his licence.

(B 78.) *Punishment of a rogue.*] By the *st.* 39 *El.* 4. a rogue taken shall by a justice of peace or constable's appointment, (or by the headborough with advice of the minister and one other of the parish,) be stripped to the middle, and openly whipped till bloody: and then with a testimonial under hand and seal of the justice of peace, constable, headborough, and minister, or two of them, of the day and place when punished, whither sent, and in what time, (which the minister shall register on pain of 5 s.) shall be conveyed from parish to parish, by the officer of the same, the next way to the parish where born, or if not known, to the parish where he last dwelt for a year, or if neither known, where he last past without punishment, thence to be sent to the house of correction or gaol, there to be set on work till he get a yearly service, or, if unable to work, till put into an alms-house.

And if the rogue prove dangerous, or will not be reformed, two justices (1 *quorum*) may commit him to the house of correction or gaol, till the next quarter-sessions, and then, if not thought fit to be delivered, the court may banish him, to be conveyed at the charge of the county to a place, which six of the privy council, (whereof the lord chancellor, keeper, or treasurer to be one,) shall appoint, or may adjudge him perpetually to the gallies; and if being banished he return, he shall be a felon.

But by the *st.* 1 *Fac.* 7. the quarter-sessions shall brand him with R. on the left shoulder, and send him to the place of his dwelling, or if not known, to the place where he last dwelt for a year, or if neither known, to the place of his birth, to be set to work; and if after he offend, he shall be adjudged a felon.

But by the *st.* 39 *El.* 4. justices of peace for a county shall not meddle in a borough, &c. but the justices of peace, mayor, &c. of such town, shall execute this statute against vagabonds and rogues.

And if a rogue come from *Scotland*, *Ireland*, or the *Isle of Man*, after punishment *ut supra*, he shall be conveyed to the port or parish where he first came, and then, at the charge of the county, be transported to the place whence he came.

By the *st.* 7 *Fac.* 4. justices of peace shall meet twice a year at least, and four or five days before issue warrants to the constables to make a general privy search in one night, in their several towns, for rogues, &c. and to bring them to such meeting to be examined and punished.

By the *st.* 13 & 14 *Car.* 2. 12. justices of peace at the quarter-sessions may cause rogues, adjudged incorrigible, to be transported to the *English* plantations beyond sea.

By the *st.* 11 & 12 *W.* 3. 18. (continued by the *st.* 1 *Ann.* 13. and 5 *Ann.* 32.) if a vagabond, &c. be brought to a constable with a pass, &c. he shall be conveyed to the next justice of peace, who, if he deserve punishment, shall send him to the house of correction; if not, shall order him to be conveyed to such town of the next county, thro' which he is to pass, as he thinks proper: and the justice of peace shall give the constable a certificate of whom he is to convey, and in what manner, and indorse what he shall have for his expence and trouble,



trouble, which the high constable shall pay, and discount with the treasurer of the county. (*Vide the §. 12 Ann. 23. throughout.*)

A rogue shall be whipt and sent to the place where he affirms his birth, or settlement; but was not to be sent to the house of correction till the *§. 11 & 12 W. 3. 18. 2 Bul. 358. R. Lamb. 205. l. 2. c. 7. sect. 1, 2.*

But if he names his birth or settlement to be where it was not, he shall be sent as an incorrigible rogue to the house of correction. *R. Lamb. 205, 206. l. 2. c. 7. sect. 1, 2.*

Children under seven years of age go with the parent vagrant to the place of his birth, or settlement, or where he passed without punishment. *R. Lamb. 206, 207. l. 2. c. 7. sect. 4. 6.*

And at the place where he passed without punishment, the children shall be relieved with the labour of the parent in the house of correction: but the children shall not be sent thither. *R. Lamb. 206, 207. l. 2. c. 7. sect. 6.*

If the parent dies where the children attain the age of seven years, they shall not be afterwards removed. *R. Lamb. 206. l. 2. c. 7. sect. 4.*

But if a man has a dwelling, he shall be sent thither. *R. Lamb. 206. l. 2. c. 7. sect. 3.*

And a wife and children being vagrants shall be sent to the father, tho' he be only a servant. *R. Lamb. 206. l. 2. c. 7. sect. 4, 5.*

[One justice cannot make an order to remove a vagrant to his settlement, tho' he can make a pass to pass him as a vagrant. *Bamber v. Hanington, 2 Ld. Raym. 1360.*]

[A person must be idle, as well as disorderly, to be committed for a vagrant. *Rex v. Miller, M. 12 Geo. 2. Str. 1103.*]

[By *stat. 14 Geo. 2. c. 33. §. 3.* a justice may send a vagabond to the most convenient house of correction in the county where he dwells.]

[By *stat. 17 Geo. 2. c. 5. §. 1.* an idle and disorderly person may be committed to hard labour for a month, by one justice.]

[And this is a commitment in execution, and the person committed is not entitled to be bailed. *Rex v. Brooke, H. 28 Geo. 3. 2 T. R. 190.*]

[Such a commitment is bad, unless preceded by a conviction. *Rex v. Rhodes, E. 31 Geo. 3. 4 T. R. 220.*]

[By *§. 6.* the justices, or two of them, shall four times a year (or oftner if need be) meet in their divisions, and order a general privy search in one night thro' their limits for rogues and vagabonds; and every justice, on information that such are in any place, shall order search; and being apprehended, they shall be brought before a justice, who, by *§. 7.* shall examine all vagrants brought before him on oath, as to their condition and settlement, and put in writing, and transmit to next quarter-sessions; and such justice shall order such persons to be publickly whipped, or send them to the house of correction till next quarter-sessions, or a less time; and may after such whipping or confinement pass them to their last settlement or place of birth; or, if under fourteen, and have father or mother, to their place of abode, to be delivered to a parish-officer; and by *§. 8.* shall transmit a duplicate of the pass with the examination, to the quarter-sessions, and send a duplicate of the examination annexed to the pass.]

[By

[By §. 9. the sessions may order rogue and vagabond to be kept in house of correction to hard labour six months longer, and incorrigible rogue not more than two years or less than six months longer, and to be whipt in manner, times and places, as they think fit, and then to be passed as aforementioned, or sent, if a male above twelve, to serve his majesty by sea or land; and if incorrigible rogue, so ordered to be detained, makes his escape, or offend again in like manner, he shall be guilty of felony, and transported for seven years.]

[By §. 10. the justice, with the pass, shall give a certificate directing how such person is to be conveyed, and what allowance the officer is to have for conveying him.]

[By §. 11. the constable shall carry the vagrant by the next direct way to the place where sent, if in the same county or division where apprehended, if in another, (having separate quarter-sessions,) then he shall deliver him to the constable of the first place in the next county, in the direct way to the place, with the pass and duplicate of examination, taking receipt; and he shall apply to a justice, who shall make a like certificate; and so on, till he is delivered to the churchwarden of the place where sent with the pass and duplicate of examination; and if he thinks the examination false, he may carry him before a justice, who may, on cause, commit him till next quarter-sessions, who may, on cause, deal with him as incorrigible rogue; but he shall not be removed but by order of two justices, as other paupers to their settlements.]

[And ruled accordingly. *Rex v. Ringwould*, T. 16 Geo. 3. B. S. C. No. 263.]

[By §. 12. vagrants shall pay for their passage, if able.]

[By §. 13. constables in northern counties are to deliver the examination of *Scotch* vagrant to the clerk of the peace, and carry the vagrant and pass to the next place in *Scotland*, and if the vagrant afterwards be found wandering, begging or misbehaving, in *England*, he shall be punished as incorrigible rogue.]

[By §. 14 & 15. masters of ships bound for *Ireland*, *Isle of Man*, *Jersey*, *Guernsey*, or *Scilly*, shall by justice's warrant take on board one vagrant for every twenty ton burthen, and land them at the place they arrive at, on penalty of 5 *l.*]

[By §. 16. quarter-sessions shall appoint rates for passing vagrants, and make regulations therein.]

[By §. 17. high constable shall pay to petty constable the rates allowed him for passing vagrants, on penalty of distress for the sum allowed, and satisfaction to petty constable for his trouble.]

[By §. 18. officer counterfeiting or altering certificate, forfeits 50 *l.* not conveying or delivering, or receiving, or giving receipt for vagrant, forfeits 20 *l.* both to be levied by distress.]

[By §. 19. the place to which vagrant is passed shall set him at work; if he refuse to work, shall carry him before a justice, to be committed to hard labour.]

[By §. 22. officers not doing their duty, and others obstructing the execution of this act, forfeits from 5 *l.* to 10 *s.* to be levied by distress, by order of one justice.]

[By §. 27. this act is not to alter the method in places where there are directions by particular statutes.]

[By

[By *st.* 28. offenders committed, whose settlements cannot be found, shall be detained in house of correction, till they can provide for themselves, or be placed by sessions as servants, apprentices, soldiers, mariners, or otherwise, in *England* or *America*.]

[Warrant to commit a pauper for returning to the town whence removed, *to remain till discharged by due course of law*, is bad; for if under 13 & 14 *Car.* 2. it must be, if to the house of correction, *there to be punished as a vagabond*; if to a public workhouse, *there to be employed in work and labour*; if under 17 *Geo.* 2. it must be, *there to be kept to hard labour for*—(any time not exceeding a month). *Baldwin v. Blackmore*, P. 31 *Geo.* 2. 1 *B. M.* 596.]

[Whether wife or child returning with husband or father may be committed? *Qu. Ibid.*]

[The quarter-sessions have a jurisdiction to examine into the accounts of constables, and make deductions. *Rex v. Earle*, T. 1 *G.* 3. 2 *B. M.* 1197.]

[A commitment of a rogue and vagabond leaving his family on the parish, must allege they are chargeable to the parish. *Rex v. Hall*, H. 5 *Geo.* 3. 3 *B. M.* 1636.]

[If he is committed till discharged according to law and custom, it is bad; it must be till the sessions, or for a less (specified) time. *Ibid.*]

[Whether formal conviction is necessary? *Qu. Ibid.*]

[It is necessary. 4 *T. R.* 222.]

[By *stat.* 25 *Geo.* 2. c. 36. constable, on notice in writing from two inhabitants, paying scot and lot, of person keeping bawdy-house, gaming-house, or disorderly house, shall go with them to a justice, and on their swearing their belief of notice, and entering into recognizance of 20 *l.* to give material evidence, constable shall enter into recognizance of 30 *l.* to prosecute at next sessions or assize. He shall be allowed expences, to be settled by two justices, and paid by the overseers; and if party convicted, overseers shall pay each of said inhabitants 10 *l.* on pain of forfeiting double.]

[Justice shall bring party accused before him, and bind him over to appear; and may take security for good behaviour in the mean time.]

[Constable neglecting his duty herein forfeits 20 *l.*]

[Justice may examine any person brought before him, and charged as vagrant, or with suspicion of felony, as to his settlement, and also way of living; the examination to be signed by justice and party, and transmitted to next quarter-sessions; and if not satisfactory, and the party does not give security to appear, justice may commit him for six days, make overseers advertise him, and time of re-examination, and then discharge, or deal according to law.]

(B 79.) *Neglect to apprehend. In a constable, &c.* By the *stat.* 39 *El.* 4. a constable, &c. not doing his best endeavour, for the apprehension of rogues, &c. in his parish, and for punishment and conveyance of them, forfeits 10 *s.* (And by the *st.* 1 *Jac.* 7. 20 *s.*) upon conviction by confession of two witnesses, before two justices of peace, to be levied by distress and sale to the use of the poor, or of the house of correction at the discretion of the justices of peace.

By



By the *st.* 7 *Jac.* 4. constables shall give account on oath in writing, under the hand of the minister, to the justices of peace at their two meetings, of what rogues they have taken on their privy search, or otherwise, and how many they have punished, or sent to the house of correction; and for neglect; or for not safely conveying those sent by the justices of peace's warrant, to the house of correction, shall forfeit what the justices of peace think meet, not exceeding 40 s. for every offence.

By the *st.* 11 & 12 *W.* 3. 18. a constable neglecting to apprehend a rogue, or being negligent in his duty, forfeits 20 s. a fourth part to the informer, three parts to the poor, to be levied on oath of one witness, on warrant of a justice of peace, by distress and sale.

If an officer refuse a rogue sent to the parish, he shall forfeit 5 l. *R. Lamb.* 208, 209. l. 2. c. 7. *sect.* 12. 14.

So, if he be sent by a general pass, and not from parish to parish. *R. Lamb.* 208. l. 2. c. 7. *sect.* 13.

[By *st.* 17 *Geo.* 2. c. 5. *st.* 5. constable or other such officer neglecting to apprehend or convey before justice any offender, shall be punished as therein after directed, which by *st.* 22. is to be by forfeiting not more than 5 l. nor less than 10 s. to the poor, to be levied by distress.]

(B 80.) *In others.*] By the *st.* 39 *El.* 4. any letting or disturbing the punishment or conveying of a vagabond, or relief or settling of impotent poor or making *rescous* against the officer, on conviction by confession, or two witnesses, before two justices of peace, shall be bound to good behaviour, and forfeit 5 l. to be levied and employed as the forfeiture of a constable *supra*.

And any wittingly bringing into this realm any like to be a vagabond, &c. from Ireland, Scotland, or the *Isle of Man*, forfeits 20 s. to the poor of the parish for every rogue set on shore.

By the *st.* 1 *Jac.* 7. every one shall cause a begging rogue, resorting with his knowledge to his house to beg, to be apprehended and carried to the next constable, on pain of 10 s. to be levied by distress and sale *ut supra*, on conviction *ut supra*.

[By *st.* 17 *Geo.* 2. c. 5. *st.* 5. if any person charged by a justice neglects to apprehend and deliver to constable, or carry before a justice, an offender against that act, he forfeits 10 s. to the poor, to be levied by distress.]

[By *st.* 23. whoever permits rogue, vagabond, or incorrigible rogue, to take shelter in his house or buildings, and doth not apprehend, or give notice to constable to apprehend, and carry him before justice, shall forfeit from 40 s. to 10 s. half to informer, half to poor, and indemnify the parish; to be levied by distress, by warrant of one justice.]

[By *st.* 24. child above seven committed as vagrant, may be put out servant or apprentice till twenty-one, or otherwise; and the person with whom such child was found, if found with it after placed out, so offending again, shall be deemed an incorrigible rogue.]

[By *st.* 25. vagrant delivered of a child shall be detained till she can be safely conveyed to a justice, who shall commit her till quarter-sessions; who may, if cause, order her to be whipt and detained for six months. The treasurer shall pay the charges of such parish. The child,

child, if a bastard, shall be settled at the mother's settlement, and not where born.]

(B 81.) *Reward for apprehending.*] By the *st.* 13 & 14 *Car.* 2. 12. justices of peace to whom a vagabond is brought, may reward the apprehender, by giving him an order under hand and seal, to the constable of the town where he past unapprehended, to pay 2 *s.* and if he refuse, may levy the penalty of the *st.* 1 *Jac.* 7. and out of it allow to the apprehender 2 *s.* for the loss of his time.

And if apprehended on the confines of a county, on certificate of a justice of peace of the county where apprehended, a justice of peace of the other county shall give a warrant to the constable of the parish where he past unapprehended, to pay 2 *s.* to the apprehender; and if the constable refuse they may levy 10 *s.* according to the *st.* 39 *El.* 4. or so much thereof for his expences and loss of time as the justice of peace shall think fit.

[By *st.* 17 *Geo.* 2. c. 5. *ss.* 1. any person may apprehend a beggar in his (the beggar's) own parish, and carry him before a justice, and shall have 5 *s.* from the overseer, which shall be allowed in his account.]

[By *ss.* 5. any person may apprehend any offender against this act (*i. e.* idle and disorderly person, rogue and vagabond, or incorrigible rogue) and carry him before a justice; and such person (constable or not) shall have 10 *s.* reward from the high constable, who shall be repaid by treasurer of county. Constable neglecting to pay reward forfeits 20 *s.*]

[By *st.* 18 *Geo.* 3. c. 19. constables are to be reimbursed their expences on account of their parishes (not otherwise provided for) out of the poor's rates; if the vestry disallows the account, a justice may settle it. Overseers may appeal.]

[By the same statute, the court before whom any person is tried for felony may order the prosecutor his expences, and an allowance for loss of time.]

(B 82.) *House of correction. By whom erected.*] By the *st.* 39 *El.* 5. (made perpetual by the *st.* 21 *Jac.* 1.) any person of age, discreet, and of sane memory, seised in fee, may by deed inrolled in *Chancery*, erect an house of correction, hospital, &c. to have continuance for ever; and place there such head and members as he thinks fit; which house, &c. shall be incorporate, have perpetual succession, common seal, may purchase goods and lands, not above 200 *l.* *per annum* (nor shall have less than 10 *l.* *per annum*) freehold, and not holden *in capite*, or by knight's service, may sue and be sued, and governed by the rules of the founder not contrary to law, may lease for twenty-one years in possession at the ancient rent, but cannot alien in perpetuity.

By the *st.* 39 *El.* 4. justices of peace in a county or corporation, at the quarter-sessions, may erect an house of correction, and provide a stock, and take care for the governing, and for the correction of offenders committed, and make rates, &c. for those purposes.

By the *st.* 7 *Jac.* 4. in every county there shall be erected an house of correction with convenient backslides, implements, &c. which shall

shall be conveyed to such persons as the justices of peace at the quarter-sessions think fit, for correction and setting to work of vagabonds, rogues, sturdy beggars, and other idle and disorderly persons. And justices of peace at quarter-sessions may elect a governor or master, to punish and set to work persons sent thither, who shall be no charge to the county, but maintained by their own labour; and may allow such master a yearly salary for his pains, and relieving the sick, to be paid quarterly before-hand by the treasurer, and in default of payment to be levied by such master, in such manner as the treasurer by the *st. 43 El. 2.* may levy it: and such governor not giving account to the justices at quarter-sessions of all sent to him, or letting any go abroad, or escape, may be fined by the quarter-sessions, which fine shall be paid to the treasurer.

By the *st. 13 & 14 Car. 2. 12.* work-houses may be erected within the weekly bills of mortality, which shall be incorporate and have several powers there allowed, &c.

By the *st. 39 El. 5.* a body politick which may alien, as mayor and commonalty, &c. may erect an house of correction. *2 Inst. 722.*

And every other who has ability by law to grant. *Ibid.*

The endowment by this statute must be of freehold land of an estate in fee-simple. *Ibid.*

Of land above the value of *10 l. per annum*, and not above *200 l. per annum.* *Ibid.*

But if it does not exceed that value at the time of the endowment, it is sufficient, tho' it be afterwards improved to a greater value. *Ibid.*

And if the first endowment be not of so great a value, they may afterwards purchase other land to the value of *200 l. per annum* in the whole. *Ibid.*

And they may take goods without limitation. *Ibid.*

And chattels real. *2 Inst. 723. in marg.*

But the endowment must be made by deed inrolled in *Chancery*, and not by other conveyance. *2 Inst. 722.*

But the deed need not be indented, or inrolled within six months. *2 Inst. 723.*

They must be erected to have perpetuity, and not for life, or years. *Ibid.*

Justices of peace may erect an house of correction at any time by the *st. 39 El. 4.* tho' the *st. 7 Jac. 4.* limits a time for the doing it. *2 Inst. 729.*

And such house of correction erected, may be so ordered that it be incorporated within the *st. 39 El. 5.* *2 Inst. 730.*

If an old house be converted to this purpose, it shall be said to be erected, tho' it be not built *de novo.* *Ibid.*

So, if an house were antiently erected, the justices of peace may erect a new house of correction, by the *st. 39 El. 4.* which continues in force. *R. 1 Sal. 362.*

But that ought to be at the charge of the county, and not of a particular precinct. *Ibid.*

So, it ought to be directed by the justices at the quarter-sessions; for they cannot delegate their authority to other justices to do it. *R. 1 Sal. 362, 3.*

[By



[By 12 Geo. 2. c. 29. §. 13. no part of a county-rate may be applied to repair houses of correction or prisons, but on presentment of the grand jury.]

[By stat. 14 Geo. 2. c. 33. §. 2. quarter-sessions, where there are no assizes, may, on presentment of grand jury, repair, enlarge, or purchase house or land to build on for houses of correction.]

[By stat. 15 Geo. 2. c. 24. justices of liberties and corporations may commit offenders to the houses of correction of counties, to which such liberty contributes.]

[By stat. 17 Geo. 2. c. 5. §. 30. quarter-sessions, on presentment of grand jury, may erect or purchase, or enlarge house of correction, and raise money for that purpose.]

[By §. 31. houses of correction are to be under the direction of quarter-sessions, who may also fine or remove the master.]

[By §. 33. the expences relating to vagrants, to houses of correction, and persons there sent, to be raised by quarter-sessions, according to the manner directed in stat. 12 Geo. 2. c. 29.]

[A building given about seventy years ago by a corporation for the purpose of a house of correction, and maintained by them to the present time, is not a house of correction within the exception of this statute, §. 31. liable to be maintained by the corporation; but the public may be called upon to support it by a county-rate. *James v. Green*, B. R. E. 35 Geo. 3. 6 T. R. 228.]

(B 83.) *Who may be committed to it.*] By the §. 39 El. 4. houses of correction are ordered for offenders committed to them. *Vide* the §. 12 Ann. 23.

But by the §. 7 Jac. 4. those general words are explained to intend vagabonds, rogues, sturdy beggars, and other idle and disorderly persons. 2 Inst. 730.

And therefore, all adjudged rogues, or vagabonds, may be committed to the house of correction. *Ibid.*]

So, an able man, who refuses labour, tho' he be not a vagrant, may be committed to the house of correction, if he has no means of living. R. 2 Inst. 730.

So, tho' he has means of living, if he be an idle or disorderly person. 2 Inst. 730.

[Justices may commit to hard labour till next quarter-session, a woman taken on a general privy search, and charged on oath with being a loose, idle, and disorderly person. *Mary Freeman, alias Talbot's Case*, M. 4 Geo. 2. Str. 882.]

[By stat. 17 Geo. 2. c. 5. §. 32. when a justice has power to commit to house of correction, and the time and punishment not directed, he may commit to hard labour till next quarter-session.]

[The house of correction for the county of *Middlesex* adapted to the separate reception of felons pursuant to the stat. 22 Geo. 3. c. 64. and other acts, is a legal prison for the safe custody of persons under a charge of high-treason. *Ex parte Evans*, B. R. H. 39 Geo. 3. 8 T. R. 172.]

#### (B 84.) Cottages.

By the stat. 31 El. 7. none shall erect or convert any building to a cottage for habitation, unless he lay to it four acres of ground of his

his own freehold and inheritance, near to such cottage, to be continually occupied therewith, on pain of 10*l.* to the queen for every offence. And none shall continue a cottage, without four acres of ground, on pain of 40*s.* per month.

Of which offences, justices of assise, justices of peace at the sessions, and lords of leets may inquire, &c. by indictment, or presentment, and award execution, by *feri facias*, *elegit*, *capias*, &c.

Provided this statute extends not to cottages in a city, borough, or market-town, or within a mile of any mines, quarries, brick-kilns, lime-pits, &c. for the only dwelling of labourers in the said works; or within a mile of the sea, or a navigable river, for the only dwelling of sailors, or any whose occupation is the making, furnishing, or victualling of a ship or other vessel; nor to a cottage in a forest, chase, warren, or park, for the under-keeper, or warrener; nor to a cottage for a common herdsman, or shepherd, or for a poor impotent person, or allowed by justices of assise, or of the peace, by order entred in open assises, or quarter-sessions. *Vide Leet*, (L 14.)

This act is a statute, and not an ordinance. *R. 1 Sal.* 195.

By the *st.* 43 *El.* 2. churchwardens and overseers, by agreement with the lord of the waste, or by order of the quarter-sessions, with the like agreement, may erect cottages on the waste, at the charge of the parish, for the only habitation of the impotent poor of such parish.

A body politick, as well as natural, is prohibited the erecting or continuing of cottages. *2 Inst.* 736.

And it is not sufficient, if the cottage has four acres of lands holden by copy; for it must be freehold. *2 Inst.* 737.

Or, of land holden for life, or years; for it must be an inheritance in fee, or tail. *Ibid.*

Or, if the acres are not accounted according to the *st.* 35 *Ed.* 1. *de adm. terris*, viz. sixteen feet and an half to the pole. *Ibid.*

If a lord of a manor permit a cottage to be erected, or continued upon his waste, and take rent for it, he shall be fined within the statute. *R. Jon.* 272.

If a parish erect a cottage, without the particular direction of the *st.* 31 *El.* 7. *Vide 1 Sid.* 359.

A common herdsman, or shepherd, cannot inhabit in a cottage, not having four acres of land annexed, unless it was erected before the *st.* 31 *El.* 7. for the exception, as to them, is only to a cottage *heretofore made*. *2 Inst.* 737.

So, neither can a poor impotent person, unless in a cottage erected, according to the *st.* 43 *El.* 2. *2 Inst.* 737.

An information lay in *B. R.* for the erecting of a cottage, as well as before justices of assise, or peace. *1 Sid.* 359.

But this is now restrained by the *st.* 21 *Jac.* 4. (*Vide 1 Sid.* 359.)

An indictment, or presentment for a cottage, is bad, unless it be said to be for habitation. *R. 1 Sand.* 135. *1 Mod.* 295.

And it shall conclude, *contra formam statuti*. *R. 1 Sand.* 135. *D. Skin.* 565.

And if the presentment be in a leet, they shall not make an amer-  
ciament under 10*l.* *1 Sand.* 135.

Yet it is not necessary to say, that any one inhabits there, if the in-  
dictment says, it was erected for habitation. *R. 2 Bul.* 264. *R. Skin.*

564.

But it is not within the *stat. 31 El. 7* if a man erect a cottage for his own habitation, tho' he does not lay four acres of land to it; for the statute extends only to cottages erected for the habitation of others. *1 Bul. 52.*

So, if a copyholder erect an house upon his copyhold, and does not lay four acres of land to it, it is not within the statute. *R. 1 Bul. 52.*

So, if a cottage was erected upon the manor of *A.* before his purchase, and he does not take rent for it; *A.* shall not be punished. *R. Jon. 273.*

If the indictment does not shew by whom the cottage was erected, it shall be quashed. *R. Jon. 273.*

So, if an indictment be, for erection and continuance, without saying, to both, *contra formam statuti.* *Comb. 307.*

[By *stat. 15 Geo. 3. c. 32.* the *stat. 31 Eliz.* is repealed.]

#### (B 85.) Inmates.

By the *stat. 31 El. 7.* no inmate, or more families than one, shall dwell in any cottage, on pain that the owner of such cottage, placing or suffering such inmate, &c. shall forfeit to the lord of the leet *10s. per menssem*: whereof the justices of peace at the sessions may inquire by indictment, &c. and award execution for the forfeiture by *fiere facias, elegit, capias, &c.* *Vide Leet, (L 14.)*

But by the *stat. 43 El. 2.* churchwardens and overseers of the poor may place inmates, or more families than one, of impotent poor of their parish, in one cottage or house.

Before this statute there was no remedy against inmates, but by by-laws in the leet. *Kit. 45. a.*

A man is accounted an inmate, who not having sufficient to live of himself by his hand, art, or trade, dwells in part of another's house. *Kit. 45. b.*

As, if common breakers of hedges, or other idle or suspicious persons dwell in an house with another. *Ibid.*

Or, if a poor labourer dwells with another, and both go by the same door into the high-street. *Ibid.*

Or, if a man, not of ability, take certain rooms in an house. *Ibid.*

But if a man demise parcel of the house where he dwells, and severs it from the other part, and makes separate doors to the high-street, the lessee is not an inmate; for they are two houses. *Ibid.*

Or, if a man take another *ad mensam*, or to sojourn with him, and he has certain rooms; he is not an inmate. *Ibid.*

Or, if a man take his married daughter with her husband, according to agreement, and suffer them to have certain rooms in his house. *Kit. 45. b.*

Or, if he suffer a gentleman to have certain rooms in his house, who does not table with him, but goes to a victualler's for his sustenance. *Kit. 45. b.*

[Defendant having houses in *Saint Catherine's* leased the rooms to several families. The Ch. J. (*Pratt*) ruled, that it was not within the statute; for a house is not a cottage. *Rex v. Pattle, M. 7 Geo. Str. 405.*]



*Pratt*, Ch. J. held, that inmates in cottages in market-towns are exempt, and that where the houses are contiguous, they are part of the town. *Rex v. Pattle*, M. 7 Geo. Str. 405.

This statute extends to a cottage, that has inmates, within a city, borough, or town, as well as elsewhere. 2 *Inst.* 738.

And to an inmate in a cottage that has above four acres of land annexed to it, as well as in cottage that has no land. *Ibid.*

But one indictment against several for having inmates shall be quashed. 2 *Roll.* 164.

(B 86.) Wood-stealers, &c.

By the *stat.* 43 *El.* 7. any convict, by confession or one witness, before a justice of peace, mayor, &c. that he cut or took away any corn growing, or robbed any garden or orchard, or for breaking or cutting a hedge, pales, rails, or fence, or pulling up fruit trees, with intent to carry away, or cutting or spoiling wood, underwood, poles or trees, not being felony, or for procuring, or knowingly receiving such offender, shall pay to the party such recompence as the justice of the peace shall direct; or, if unable, shall be delivered to the constable to be whipped; and for the second offence shall be whipped; and the constable refusing to whip shall be committed to gaol, without bail, till he procure such whipping. Provided a justice of peace shall not act in his own case, unless assisted by some other justice.

By the *stat.* 15 *Car.* 2. 2. a constable, or any person, may in his parish, &c. apprehend whom he suspects of having or carrying any wood, &c. or any bark, gates, stiles, posts, rails, pales, broom, or furze, (and the constable by warrant of a justice of peace may search the house and yards of any suspected, &c. and finding, may apprehend) and carry before a justice of peace of the county or town: and if he cannot give a satisfactory account how he came by such wood, with the owner's consent, or, by a day set, produce the feller, or a witness to prove the sale, he shall for the first offence pay such satisfaction to the owner, and in such time, as the justices shall appoint, and likewise a sum not above 10s. to the poor, and on non-payment shall be whipped by the constable, or sent to the house of correction, as the justice thinks best, for not more than a month; for the second offence he shall be sent to the house of correction for a month, and kept to hard labour: for the third offence shall be deemed an incorrigible rogue.

And if any buys stolen wood, &c. of any, whom he might justly suspect to come unlawfully by it, a justice of peace having examined, and found the matter on oath, shall order the buyer to pay treble value to him, from whom the wood, &c. was stolen, and if not paid, shall levy it by distress and sale, and for want of distress, commit the offender to gaol for a month, without bail.

But none shall be prosecuted on this statute, but within six weeks after the offence.

The statutes 43 *El.* 7. and 15 *Car.* 2. 2. extend to gentlemen as well as others; for the court cannot make a distinction between the quality of persons. *Per Cur. B. R. Trin.* 2 *Ann.* upon conviction of *one Burnaby*. 1 *Sal.* 181.

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But justices of peace cannot make a conviction upon these statutes, if a property be claimed in the wood; and if they do, a prohibition lies, or an action against him who levied the damages awarded by the conviction. *Per Cur. in Burnaby's Case, 1 Sal. 182.*

And after a conviction removed by *certiorari*, the defendant may suggest his property by way of plea. *Per Holt; but the others cont. in Burnaby's Case, 1 Sal. 182.*

And if the conviction does not specify the certain number of trees, or quantity of wood cut, it is bad. *R. Trin. 2 Ann. B. R. in Burnaby's Case, 1 Sal. 181.*

[By *stat. 23 Geo. 2. c. 26.* person convicted by one justice of stealing or maliciously destroying turnips, shall make satisfaction to the owner, and pay not exceeding 10*s.* to the poor, or in default be committed not exceeding a month, or whipt for first offence; and for the second committed for three months.]

[By *stat. 6 Geo. 3. c. 36.* persons in the night-time destroying or taking timber-tree, or tree likely to become timber, or in an inclosed ground, any roots, shrubs, or plants of 5*s.* value, and all aiding and receiving, are guilty of felony, and may be transported for seven years.]

[By *stat. 6 Geo. 3. c. 48.* person damaging or carrying away timber-tree, or tree likely to become timber, or any part, or the lop or top, convicted before one justice, shall forfeit not exceeding 20*l.* and charges, or be committed from twelve to six months for first offence, 30*l.* or from eighteen to twelve months for second offence, and felony and transportation for seven years for third offence.]

[Oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore and birch, are timber; and by *stat. 13 Geo. 3. c. 33.* poplar, alder, larch, maple and hornbeam, are so also. *N. B. PINE is omitted in both acts, probably thro' inattention.*]

[Destroying or carrying away root, shrub, or plant, out of field or cultivated land, convicted before one justice, forfeits not exceeding 40*s.* and charges for first offence, 5*l.* for second offence, and felony and transportation for seven years third offence.]

[Destroying or carrying away from woods, underwoods, or wood-grounds, any wood, underwood, or sticks, or having the same in their custody, and not giving good account thereof, convicted before one justice, forfeits not exceeding 40*s.* and charges for first offence, 5*l.* for second offence, and deemed incorrigible rogue for third offence.]

[By *stat. 9 Geo. 3. c. 41.* this clause is extended to the king's forests, &c. and to hollies, thorns, and quicksets there, or any other wood-grounds.]

[On non-payment, commitment to hard labour for one month, and once whipt, for first offence; and for three months, and thrice whipt for second offence.]

[Person attempting to hinder seizing offenders, forfeits 10*l.* or hard labour not exceeding six months.]

[By *stat. 13 Geo. 3. c. 32.* persons stealing or maliciously destroying turnips, potatoes, cabbages, parsnips, pease, or carrots, on conviction before one justice forfeit 10*s.* above the value to be given to the owner and poor. The owner may be evidence, and then all the forfeiture goes to the poor.] (B 87.)

## (B 87.) Victuallers.

By the *st.* 23 *Ed.* 3. 6. mayors, bailiffs, &c. shall inquire and punish victuallers who sell at excessive prices; and if convict of neglect in inquiring, shall pay treble price.

By the *st.* 12 *R.* 2. 3. *Raff.* (which confirms the statute of victuals) it is enacted, that victuallers be justified by justices of peace at the suit of the king or of the party.

By the *st.* 12 *Ed.* 4. 8. mayors, bailiffs, &c. and those who have charter, shall have the sole surveying of a victualler; and all patents to others for that purpose are void.

Justices of peace may inquire of victuals, and victuallers who do not observe the assise. *Semb. Cro. Car.* 113.

By the *st.* 12 *Ed.* 2. 6. an officer in a city or borough, who hath an assise, shall not merchandize for wine or victual, on pain of forfeiting it, either in gross or by retail.

By the *st.* 6 *R.* 2. 9. a victualler shall not execute a judicial office in a city, or borough, if sufficient beside.

But by the *st.* 3 *H.* 8. 8. if a victualler be chosen officer, two others, not victuallers, chosen by the commonalty, shall be sworn with him to set prices, &c. And then such officer may sell victual in gross, or by retail.

By the *st.* 6 *R.* 2. 10. *aliens amyes* may bring fish, or other victual, to cities, boroughs, &c. and there sell them by retail, or in gross. Confirmed by the *st.* 1 *H.* 4. 17.

And by the *st.* 14 *H.* 6. 6. a disturber of such foreigner forfeits ten pounds.

By the *st.* 4 *H.* 7. 3. in London, or any walled town, (except *Berwick* and *Carlisle*,) or in Cambridge, no butcher shall kill within the walls, on pain of 12*d.* for every ox, and 8*d.* for every other beast.

(B 88.) *Corrupt victual.*] By the *st.* 51 *H.* 3. of *Pillory and Tumbrel*, a jury shall inquire of a butcher, who sells contagious flesh, or dead of the murrain, of a cook who seeths unwholesome fish or flesh, and of such who buy flesh of Jews and sell it to Christians. *Vide Leet*, (L 10.)

By a *st. incerti temporis* (*H.* 3 *Ed.* 1. or *Ed.* 2.) a butcher who sells swine's flesh meazled, flesh dead of the murrain, or bought of Jews, for the first offence shall be amerced; for the second pillored; for the third put to fine and imprisonment; for the fourth shall abjure the town. *Vide Keble's Statutes*, fo. 86. 17 *Ed.* 2. 7.

(B 89.) *Price.*] By the *st.* 23 *Ed.* 3. 6. butchers, fishmongers, regraters, hostlers, brewers, bakers, poulterers, and all other sellers of victuals, shall sell at reasonable prices, having regard to the price in places adjoining. *Vide Leet*, (L 9. 14.)

By the *st.* 13 *R.* 2. 8. victuallers shall have no more gains than is limited by the justices of peace, on pain to be punished at their discretion, where no punishment is expressly given.

By the *st.* 25 *H.* 8. 2. on complaint of enhancing the prices of victuals, the lords of the privy council, and justices of either bench, chamberlains, chancellor, and barons of the *Exchequer*, or seven of them, (whereof the lord chancellor, treasurer, lord president, or

privy seal to be one,) may set the prices at which all shall sell after proclamation made: but mayors, bailiffs, &c. of towns corporate, may set the prices, as before this act.

By the *st.* 2 & 3 *Ed.* 6. 15. a butcher, brewer, baker, poulterer, cook, or fruiterer, conspiring to sell at certain prices, forfeits 10*l.* for the first offence, or twenty days' imprisonment with bread and water only, on non-payment in six days; 20*l.* for the second offence, or pillory; 40*l.* for the third offence, or pillory and one ear, and be infamous. *Vide Leet*, (L 14.)

If a corporation of any of these victuallers conspire, they shall be dissolved.

*Vide Leet*, (L 9.)

(B 90.) Weights and Measures.

(B 90.) *What weights are allowed.* Troy.] By the *st.* 11 *H.* 7. 4 two justices of peace (1 *qu.*) by examination or inquiry, may hear and determine offences in mayors, &c. for not making, signing, and viewing weights and measures, or in buyers and sellers by defective weights and measures; and may set a fine and amerciamment on the offenders, and destroy such defective weights and measures.

[By *st.* 10 *Geo.* 3. c. 44. trader subject to excise, using false scales or weights, to defraud the king of duties, forfeits 100*l.*]

As to Troy weight, *vide Leet*, (L 6.)—*Vide* 4 *Inst.* 273.

*Averdupois.*] As to *Averdupois*, *vide Leet*, (L 7.)

*Averdupois* is so called, because it gives full weight, 4 *Inst.* 273.

By *Averdupois* weight are weighed all physical drugs, wax, pitch, tar, iron, steel, lead, hemp, flax, flesh, butter, cheese, and all commodities subject to waste. 4 *Inst.* 273.

By the *st.* *Comp. Pond.* 25*s.* weight makes a pound of lead, 12 pounds a stone, 6 stone wanting 2 pounds a formel, 30 formel a load.

By the *st.* *Comp. Pond.* the *st.* 25 *Ed.* 3. 9. and 31 *Ed.* 3. 8. 14 pounds of wool make a stone, 26 stone and no more a sack, and 12 sacks a last.—So, the *st.* 11 *H.* 7. 4. *Dav.* 8. b.

(B 91.) *What measures are allowed.*] By the *st.* *M. Ch.* 9 *H.* 3. 25. *sit una mensura vini per totum regnum, et una mensura cervisia, et una mensura bladi, scilicet, quarterium Lond.*

So, by the *st.* 25 *Ed.* 3. 10.; 13 *R.* 2. 9.; 27 *Ed.* 3. 10.; and 16 *Car.* 1. 19.

By the *st.* *Comp. Mens.* 31 *Ed.* 1. by consent of the whole realm the king's measure was made; viz. 32 grains of wheat, in the midst of the ear dry, make a penny sterling; (or 24 grains of barley, 4 *Inst.* 273, 4.) 20*d.* make an ounce; 12 ounces make a pound; 8 pounds make a gallon of wine; 8 gallons make a bushel; 8 bushels make a quarter. Confirmed by the *st.* 12 *H.* 7. 5.

A pound weight is a pint in measure; 2 pints make a quart; 2 quarts make a pottle; 2 pottles make a gallon; 2 gallons make a peck; 4 pecks make a bushel; 4 bushels make a comb; 2 combs make a quarter; 6 quarters make a wey; 10 quarters make a last. 4 *Inst.* 274.

By



By the *st.* 25 *Ed.* 3. 10. confirmed by the *st.* 15 *R.* 2. 4. ; 1 *H.* 5. 10. and by the *st.* 11 *H.* 7. 4. the quarter shall contain 8 bushels, and no more.

By a *st. incerti temporis*, (*H.* 3 *Ed.* 1. or *Ed.* 2.) 4. *de pish.* Toll shall be taken by the king's measure. *Vide Keble's Stats. fo.* 85.

*De Mensura Vini & Cervisia, vide post.* (B 94. 98.)

(B 92.) *Measure of length, &c.*] By the *st. comp. ulnar.* three grains of barley, dry and round, make an inch; 12 inches make a foot; 3 feet a yard; 5 yards and an half a perch; 40 perches and 4 in breadth make an acre. *Vide st. de mens. terris, 33 Ed.* 1. 4 *Inst.* 275.

[For the measure of corn and salt, see the *stat.* 22 *Car.* 2. c. 8. and *stat.* 22 & 23 *Car.* 2. c. 12.]

[Under these statutes it is illegal to sell corn by any other measure than the *Winchester* measure. *Rex v. Major, T.* 32 *Geo.* 3. 4 *T. R.* 750.]

[The buyer of corn by any other than the *Winchester* measure forfeits, by *stat.* 22 & 23 *Car.* 2. c. 12. the penalty of 40 s. besides the value of the corn. *Rex v. Arnold, T.* 33 *Geo.* 3. 5 *T. R.* 353.]

[If the reddendum in an hospital renewed lease be "so many quarters of corn" it will be understood to mean legal quarters, reckoning the bushel at eight gallons, altho' the old leases before the *st.* 22 & 23 *Car.* 2. c. 12. contained the same reddendum, and altho' till lately the lessees had paid by composition, reckoning the bushel at nine gallons. *Master, &c. of Saint Cross v. Lord Howard, B. R. T.* 35 *Geo.* 3. 6 *T. R.* 338.]

By the *st.* 27 *H.* 8. 6. four inches make an hand.

A yard and quarter make an ell; 5 yards and an half make a pole or perch: 40 poles make a furlong; 8 furlongs make an *English* mile. 4 *Inst.* 274.

Seven feet make a fathom. *Dalt.* 121. (*Edition of* 1727. 370.)

(B 93.) *Manner of measuring.*] By a *st. incerti temporis*, (*H.* 3 *Ed.* 1. or *Ed.* 2.) 9. *de pish.* no corn shall be sold by the heap, except oats, malt, and meal. *Vide Keble's Statutes, 86.*

By the same *stat.* 4. no toll shall be taken by the heap, but by strick.

And by the same *stat.* 8. any convicted of double measure, a greater to buy by, and a less to sell by, shall be imprisoned. *Vide Keble's Statutes, 85, 86. 17 Ed.* 2.

(B 94.) *Affises, and assay of ale.*] *Affise* is sometimes taken for an ordinance, for putting things into a certain rule and disposition. *Lit.* 8. 234.

*Cervisia* in the antient statutes includes beer. 4 *Inst.* 262. in marg.

*Bier* is a Saxon word. 4 *Inst.* 262. in marg.

By the *stat. M. Ch.* 9 *H.* 3. 25. *per totum regnum fit una mensura cervisia.*

By the *stat. mens.* 31 *Ed.* 1. a penny sterling shall weigh 32 grains of wheat dry in the midst of the ear; 20 pence make an ounce; 12 ounces a pound; and 8 pounds a gallon of wine.

By the *st.* 23 *H.* 8. 4. every barrel of beer shall contain 36 gallons a kilderkin 18 gallons, a firkin 9 gallons, of the king's standard gallon; and a barrel of ale 32 gallons, a kilderkin 16, and a firkin 8 gallons of the same standard.

By the *st.* 12 *Car.* 2. 23. a barrel of beer shall be 36, of ale 32 gallons, according to the standard of the ale quart, 4 of which make a gallon; and of other liquors, according to the wine gallon.

By the *stat.* 1 *W. & M.* 1 *sess.* 24. a barrel of beer and ale shall be 34 gallons, by the ale quart, [Except in *London* and *Westminster*, and the bills of mortality, where it shall be according to former acts.]

[By the same *stat.* *f.* 13. justices are empowered upon complaint made to them by any brewer, within their jurisdiction, of any overcharge returned upon him by any of the gaugers, to hear and determine the same, and on due proof to discharge or acquit such brewer of so much of his charge as shall be made out.]

[After the duties of excise are charged on wash made for extracting spirits by *stat.* 26 *Geo.* 3. *c.* 73. if any part of the wash be lost, the manufacturer cannot be relieved by the justices from the respective proportion of the duty, as for an overcharge. *Rex v. Sikes, M.* 37 *Geo.* 3. 7 *T. R.* 56.]

By the *stat.* 11 & 12 *W.* 3. 15. a retailer of ale, or beer, shall sell only by the standard ale quart, or pint, duly marked, on pain of a sum, not above 40*s.* nor under 10*s.* a moiety to the poor, a moiety to the informer, to be levied by justices on goods of the offender, on oath of one witness in thirty days.

And the officer of excise shall *gratis* bring the standard quart and pint to every borough and town, by 24 *June* 1700, if no brads standard quart and pint already there, on pain of 5*l.*

And the mayor, &c. shall see every quart and pint measured by it, and mark't with *W. R.* and a crown, on request, or forfeit 5*l.* and treble damages and costs to the party.

By the *st.* 2 & 3 *Ed.* 6. 10. in *June*, *July*, and *August*, malt shall be seventeen days in the fatt, floor, steeping, and drying, and at other times three weeks, on pain of 2*s.* per quarter, otherwise it cannot be wholesome; he that mingles ill-made malt, or of mow-burnt or spired barley with good, forfeits 2*s.* per quarter, and he that sells it not well trodden, rubbed, or fanned, forfeits 20*d.* per quarter; a moiety to the king, a moiety to the informer.

By the *st.* 1 *Jac.* 18. an importer of corrupt or unclean hops forfeits them; and the brewer, who uses them, forfeits the value.

[By *st.* 2 *Geo.* 3. *c.* 14. if brewer or retailer mixes strong beer or strong worts after gauging, with small beer or wort, or water; he forfeits 50*l.*]

(B 95.) *Price.*] By the *st.* *Aff. Pan. and Cerv.* 51 *H.* 3. when wheat is sold at 3*s.* or 3*s.* 4*d.* per quarter, barley at 20*d.* or 2*s.* oats at 16*d.* brewers in cities shall sell two gallons of beer or ale for a penny, and out of cities three or four gallons; and when in cities, brewers sell three, out of towns they ought and may sell four gallons for a penny.

By the *st.* 23 *H.* 8. 4. none shall sell a barrel, kilderkin, or firkin of beer or ale, but at the prices set by the mayor, &c. in towns corporate;

porate, and by justices of peace out of towns, on pain of 6s. for a barrel, 3s. 4d. per kilderkin, 2s. per firkin, 10s. for a greater, and 12d. for a less vessel.

By the *st.* 1 *Jac.* 9. an inn-keeper, alehouse-keeper, or victualler, who sells less than a full quart of the best beer or ale, or two quarts of small for a penny, forfeits 20s. to the use of the poor, to be levied by distress and sale after six days, or else by imprisonment.

By the *st.* 12 *Car.* 2. 24. no brewer, or retailer of beer or ale, shall take more than the excise above the usual prices, but as much as the excise is above the usual prices he may take.

By the *stat.* 1 *W. & M.* 1 *st.* 24. no retailer of beer or ale shall during that act be impleaded, for selling above the prices before appointed.

[By the *st.* 2 *Geo.* 3. c. 14. no brewer or retailer shall be sued for advancing the price of strong beer in a reasonable degree.]

(B 96.) *Of bread.*] By the *st.* 51 *H.* 3. *Aff. Pan. and Cerv.* when a quarter of wheat was 12d. wastel bread of a farthing shall weigh 6l. 16s.: cocket bread of the same corn, more than wastel by 2s.; of worse corn, more by 5s.; finnell bread less than wastel by 2s.; bread of the whole wheat shall weigh a cocket of 5s. more than wastel, and an half; bread of trect shall weigh two wastels; bread of common wheat shall weigh two great cockets, & sic pro rata.

According to this proportion, the assise of bread at this day, when wheat is sold at

	1. oz. dwt.	Wheaten. 1. oz. dwt.	Household. 1. oz. dwt.
20s. per quarter, penny white } should weigh }	1 4 18	2 1 6	2 9 16 Troy.
24s. A penny white loaf will	1 2 2	1 9 2	2 4 4
28s. then weigh	1 0 1	1 6 0	2 0 2
32s. <i>Et sic pro rata</i> , the penny	0 10 11	1 3 16	1 9 2
36s. weight being now 3d. which	0 9 8	1 2 1	1 6 16
40s. was then a penny sterling,	0 8 9	1 0 12	1 4 18
44s. and a pound of silver being	0 7 13	0 11 10	1 3 6
48s. but 20s. till raised by H. 6.	0 7 1	0 10 10	1 2 1
52s. to 30s. by Ed. 4. to 40s.	0 6 10	0 9 14	1 1 0
56s. by H. 8. to 45s. and since	0 6 0	0 9 0	1 0 0
60s. to 60s.	0 5 11	0 8 8	0 11 2

*Wingate's Abridgement, Weights, 3.*

At the time of the statute 51 *H.* 3. according to this assise by the computation of the king's baker, a baker in every quarter of wheat gained 4d. and the bran and two loaves, three halfpence for three servants, an halfpenny for two lads, an halfpenny for salt, an halfpenny for yeast, a farthing for candle, 2d. for wood, and an halfpenny for his boutel. *Rast. Weights, 2. Vide the st. 51 H. 3. Aff. Pan. & Cerv.*

But by the book of assise now in use published by proclamation *Eliz.* bakers are allowed for their charge in baking, in every quarter of wheat of a middle price, 4s. and bakers in a town corporate, who pay scot and lot, 6s. *Wing. Abr. Weights, 4.*

By the *st.* 51 *H.* 3. *Aff. Pan. & Cerv.* and the *st. de pift. incerti temporis* (*H.* 3 *Ed.* 1. or *Ed.* 2.) the assise shall be set according to the middle price of wheat, and not changed but on the increase or decrease of 6d. in the sale of one quarter. *Vide Keble's Statutes, 85.*

[By



[By 10 Geo. 3. c. 39. *Michaelmas* quarter-session shall appoint persons in (from two to six) market-town, to make weekly returns of the prices of corn to a person at the treasury, to be appointed by the treasury, and to send duplicates four times a year to the clerk of the peace; the returns to be published weekly in the *Gazette*.]

[The commissioners of customs are to transmit annually to treasury an account of corn exported and imported, and bounties and duties paid and received.]

By *ft.* 31 Geo. 2. c. 29. 3 Geo. 3. c. 11. and 13 Geo. 3. c. 62. a new assise of bread is settled; whereby, when wheat (with the allowance for baking) is at

	Wheat.	Stand.	Wheat.	Housh.
	oz. dr.	oz. dr.	oz. dr.	oz. dr.
5 s. per bushel, the penny-loaf weighs	12 1	13 14	16 6	
And the peck-loaf shall be sold for	1s. 11d.	1s. 8d.	1s. 5d.	

And the magistrates have power of permitting bread to be made of other grain; and when the price of grain, and allowance for baking, is at 5 s. per bushel, the penny loaf shall weigh

Rye.	Barley.	Oats.	Beans.	Maslin.
oz. dr.	oz. dr.	oz. dr.	oz. dr.	( $\frac{2}{3}$ wheat, $\frac{1}{3}$ rye.) oz. dr.
12 8	13 8	6 4	16 12	14 —
Peck loaf 1s. 10d.	1s. 9d.	3s. 8d.	1s. 4 $\frac{1}{2}$ d.	1s. 8d.

[There is a penalty from 10l. to 40s. for using allum, &c. or for having it in possession, from 5l. to 40s. for adulterating meal, and from 5l. to 20s. for adulterating bread; 5s. per ounce deficiency in weight; from 40s. to 10s. for not marking bread.]

[The proportion between the three sorts of bread made of wheat is to be, as 8, 7, 6. The quantity of wheaten which is sold for 8d. must be sold for 7d. if standard, and 6d. if household-bread; or, the money which buys 6lb. of wheaten, will buy 7lb. of standard, and 8lb. of household-bread. And white 2d. loaves to be three-fourths of the weight of wheaten.]

(B 97.) *The duty of a baker.*] By the *ft. de pist. incerti temporis*, (H. 3 Ed. 1. or Ed. 2.) every baker shall have his own mark for his bread. *Vide Keble's Statutes*, 85.

By the *ft.* 51 H. 3. twelve men sworn shall inquire of the price of wheat, and if bakers keep the assise; and the bailiff shall bring in all the bakers with their measures.

By the same statute, if a baker be convicted that he hath not kept the assise, for the first, second, and third offence he shall be amerced, if he exceed not above 2s. And by the *ft. de pist. incerti temporis* (H. 3 Ed. 1. or Ed. 2. not above 2s. 6d.) weight in a farthing loaf; but if he want more weight than that, or if he offend often, tho' he want less, he shall be set in the pillory without redemption. *Vide Keble's Statutes*, 85.

(B 98.) *Of wine.*] The *ft. M. Ch.* 9 H. 3. 25. provides, *quod sit una mensura vini per totum regnum.*

By the *ft.* 2 H. 6. 11. none shall import, or make a ton of wine, unless it contain 252 gallons, a pipe 126 gallons, and the tertian and

and hoghead after the same rate, on pain to forfeit the said wine, to the lord of the town, one fourth to the informer: and justices of peace, and mayors and bailiffs who have power of the peace, may inquire of this statute.

And by the *st.* 18 *H.* 6. 17. it is said, that by the antient assise, every ton ought to contain 252 gallons, every pipe 126 gallons, a tertian 84, an hoghead 63 gallons. [So, by the *st.* 2 *H.* 6. 11.]

By the *st.* 1 *R.* 3. 13. the butt shall contain 126 gallons, the barrel 31½ gallons, rundlet 18½ gallons.

Twelve ounces make a pound, eight pounds a gallon of wine.  
*4 Inst.* 274.

By the *st.* 27 *Ed.* 3. 8. all wine imported for sale shall be duly gauged by the king's gauger, or his deputy; and the refuser forfeits his wine, and shall suffer imprisonment and ransom; and if the ton wants of the assise, he shall abate in his price.

By the *st.* 31 *Ed.* 3. 5. a seller of a ton or pipe of wine ungauged, shall forfeit it or the value to the king.

By the *st.* 18 *H.* 6. 17. a seller of a ton, pipe, tertian, or hoghead of wine, not gauged, forfeits it, or the value, a moiety to the informer; and if it want of the assise, he shall abate in the price *pro rata*, on pain of forfeiture.

By the *st.* 1 *R.* 3. 13. it is also enacted in like manner.

By the *stat.* 28 *H.* 8. 14. (which confirms the 1 *R.* 3. 13.) the gauger shall mark the contents of the ton, &c. on the head of such vessel.

By the *st.* 1 *W. & M.* *sess.* 1. 34. no retailer of wine shall sell but in pewter sealed, on pain of 5 *l.* to the informer.

By the *st.* 2 *W. & M.* *sess.* 2. 14. any convict by confession, or two witnesses in thirty days before a justice of peace, forfeits fifty shillings.

The king cannot license to break the assises of wine by a *non obstante* of the *st. de pistoribus.* *Vau.* 343.

By the *st.* 4 *Ed.* 3. 12. assay shall be made of wines at *Easter* or *Michaelmas*, or oftner, by lords, or mayors and bailiffs of towns, and all found corrupt shall be poured out, and the vessels broken: and the chancellor and treasurer, justices of either bench, and of assise, shall have power to inquire of mayors and ministers of towns, if they do according to the statute.

By the *st.* 12 *Car.* 2. 25. no merchant, vintner, seller, or retailer of wine shall mingle or utter the same mixt with other sorts of wine, cyder, perry, stum, honey, sugar, vitriol, molasses, or any syrup, isinglass, brimstone, lime, raisins, water, other liquors or ingredients, clary or other herb, or any flesh, on pain of 100 *l.* to the seller in gross, and 40 *l.* to the retailer, a moiety to the king, and a moiety to the informer,

By the *st.* 1 *W. & M.* 1 *sess.* 34. if any sell by gross, or retail any wine corrupt or adulterated, or adulterate any wine, he forfeits 300 *l.* a moiety to the king, and a moiety to the informer.

The king cannot dispense with the statutes against corrupting of wine. *Vau.* 344.

(B 99.) *Price.*] By the *st. de pist. incerti temporis* (*H.* 3 *Ed.* 1. or *Ed.* 2.) a gallon of wine shall be at 12 *d.* and if taverners exceed, their

their doors shall be shut up by the mayor and bailiffs. [Repealed by the *st.* 21 *Jac.* 28.] *Vide Keble's Statutes*, 85.

By the *st.* 4 *Ed.* 3. 12. wines shall be sold at reasonable prices.

By the *st.* 28 *H.* 8. 14. no wine *French* shall be sold above 8 *d.* the gallon, 4 *d.* the pottle, 2 *d.* the quart, 1 *d.* the pint; nor sack or sweet wines above 12 *d.* the gallon, 6 *d.* the pottle, 3 *d.* the quart, and 1½ *d.* the pint. And the lord chancellor, treasurer, president of council, privy seal, two chief justices, or three of them, might set prices of wine sold in gross by the ton, &c. And after proclamation none shall sell above, on pain of 40*s.* for every vessel, a moiety to the king, and a moiety to the corporation, if in a town corporate, else to the informer.

By the *st.* 7 *Ed.* 5. 6. no *Gascoigne* or *French* wine shall be sold above 8 *d.* the gallon, nor *Rocheile* wine above 4 *d.* per gallon, nor other wine above 12 *d.* per gallon, on pain of 5 *l.*

But by the *st.* 5 *El.* 5. a retailer might sell at prices, allowed by proclamation issued with the assent of such lords, as by the *st.* 28 *H.* 8. 14. were to set prices on wines in gross.

By the *st.* 12 *Car.* 2. 25. no retailer shall sell *Canary*, *Spanish*, or sweet wines above 18 *d.* per quart, nor *French* wine above 8 *d.* per quart, nor *Rhenish* above 12 *d.* per quart, on 5 *l.* penalty. Provided the lord chancellor, &c. between the 20th of *November* and the last of *December*, may yearly set and alter the prices of wines; and then, not above those prices.

By the *st.* 1 *W. & M.* 1. *sess.* 34. after 10th *September*, 1690, none shall sell *French* wine above 6 *d.* per quart, on pain of 5 *l.* for the first, and 10 *l.* per quart for every other offence.

By the *st.* 24 *H.* 8. 6. if any refuse to sell wine at the prices set for ready money, he shall forfeit the value of the wine, unless he make oath he keeps not the same for sale in gross: and justices, mayors, &c. may on request enter and sell the same.

The king cannot dispense with the statutes which limit the prices of wine. *Vau.* 343, 4.

(B 100.) *Wine licence.*] At the common law every one might sell wine without restraint. *R.* 1 *Sid.* 6. *Hard.* 344.

But by the *stat.* 7 *Ed.* 6. 5. none shall retail wine, but in cities, boroughs corporate, port or market towns, on pain of 10 *l.* per diem, nor in cities or towns corporate, unless appointed by the head officer, and most part of the common council, aldermen, burgesses, or commonalty there, by writing under the common seal; nor in a market town, unless licensed by the justices of peace at the general sessions, by writing under the seals of the majority, on pain of 5 *l.* who shall not license above two in any city, town, &c. except those mentioned in the statute.

Yet the king might dispense with any person to retail wine, notwithstanding that statute. *Vau.* 344. 346. *R.* 1 *Sid.* 6. *Semb. Dy.* 270. *a.*

And king *James* the First granted to the vintners of *London*, that every one free of their company, might sell wine by retail or in gross, within the city and suburbs, and three miles of the walls of the city, all sea-ports, and in cities and port-towns between *London* and *Dover*, and *London* and *Berwick*, notwithstanding the 7 *Ed.* 6. which grant  
i good. *R. Vau.* 330. 348, &c. 359. By



By the *st.* 12 *Car.* 2. 25. the king may commission two or more, who may grant wine licences to whom they think fit, for a term not above twenty-one years, at a certain rent, without fine, which shall not be assignable; but they must use the selling of wine, or be owner of the house.

Not to prejudice the universities, or company of vintners.

By the *st.* 15 *Car.* 2. 2. 14. the duke of *York* and his heirs male had sole power of wine licences, exclusive of the king: saving the privilege of the universities, and company of vintners.

And by the proviso in the statutes of 12 *Car.* 2. and 15 *Car.* 2. the company of vintners have power to sell wine by retail, &c. without licence, as they might by the charter 9 *Jac.* *R. Vau.* 332.

So, they may sell by retail without licence of the mayor, &c. in a corporation, or of justices of peace in a market town; for the clauses in the *st.* 7 *Ed.* 6. extend only to private persons, not to taverners. *Dub. Hard.* 344.

So, by the *st.* 7 *Ed.* 6. 5. that act is not to prejudice either of the universities, so as there be not more taverns kept there than are provided for in the statute, *viz.* *Oxford*, 3. *Cambridge*, 4.

So, by the same *stat.* persons, who by licence may have a tavern, may sell wine by retail in their houses, without other licence. *Per Hale & Atkins, two Barons cont. Hard.* 345. *Dub. Hard.* 464.

But a licence to retail wine does not import a licence to have a tavern. *R. Hard.* 348.

[If a wine merchant sells a gallon of wine in his own house, which is drank in another in the same town, he is a retailer within 12 *Car.* 2. c. 25. *Astell v. Andrews*, *M.* 13 *Geo.* *Str.* 718. *Ld. Raym.* 1421.]

[If a merchant sells one dozen quart bottles, unmeasured, it is retailing. *B. R. Haswell v. Chalie*, *P.* 12 *Geo.* 2. *And.* 392. *Str.* 1124. Reversed by the lords, because one dozen quart bottles was not found to be a retail measure; *venire de nova* awarded. *Str.* 1124.]

*Vide Leet*, (L 14.)

#### (B 101.) Default of Officers.

So, justices of peace by their commission may inquire of sheriffs stewards, bailiffs, constables, gaolers, and other officers who are remiss in their duty.

By the *st.* 23 *H.* 6. 10. justices of peace may inquire, &c. if the sheriff let to farm his county, or any of his hundreds or bailiwicks; or return bailiffs or their servants or any pannel; or if he, his under-sheriff, &c. refuse to bail those bailable, (*vide Bail*, (F 5.) or take more fees than allowed, (*vide Extortion*), for which they shall forfeit treble damages to the party and 40 *l.* a moiety to the king, a moiety to the prosecutor.

By the *st.* 11 *H.* 7. 15. justices of peace, or any of them, may inquire if the sheriff, shire clerk, &c. enter a plaint in the name of a plaintiff not present in person, or by attorney; or enter more plaints than one for the same cause; or more than there is cause of action for; and if he be convicted on examination, he shall forfeit 40 *s.* for every default; which the justices of peace, on pain of 40 *s.* shall certify into the *Exchequer*.

And such justices of peace, or any of them, (to be appointed for these purposes at *Michaelmas* sessions by the *custos rotulorum*, or senior justices

justice of the (*quorum*) may inquire of defaults in bailiffs not warning defendants to appear in the county court, or not doing their office, who convicted, &c. forfeits 40*s.* for every default.

And the sheriff, &c. shall make no estreats to levy amerciaments, till two justices of peace (1 *quorum*) have viewed their books, and till an indenture be made of such estreats, under the seals of the sheriff and the said justices; and that the justices of peace swear bailiffs not to levy more than contained in such indenture, on pain of 40*s.* for every default, &c.

By the *st.* 42 *Ed.* 3. 9. justices of peace may hold suit, if the sheriff, &c. levy the king's debts, and do not shew the estreats under the *Exchequer* seal to the party, and cause what is paid to be totted; who shall for default pay treble damages to the party, and a fine to the king.

And by the *st.* 7 *H.* 4. 3. the justices, before whom issues or amerciaments are forfeit, shall charge the clerk of the estreats on oath, to express in the roll of estreats the cause, the term, the nature of the writ, and parties between whom such estreats and amerciaments were lost.

By the *st.* 27 *El.* 7. justices of peace may inquire, &c. of sheriffs, &c. who return jurors without proper addition, or levy issues of any not in right chargeable with them, who shall forfeit five marks to the queen, and five marks to the party grieved.

By the *st.* 27 *El.* 12. an under-sheriff, bailiff of franchise, their deputy or clerk, or any who meddles with the return of a jury, or execution of process, shall before justices of assize, *custos rotulorum*, or two justices of peace (1 *quorum*) take the oath of supremacy, and an oath not to use the office corruptly, nor take more than due fees on return of an enquest, &c. before he executes his office, on pain of 40*l.* a moiety to the queen, a moiety to the prosecutor; and offences contrary to the act, or oath, justices of peace may hear and determine, and award process, by *fieri facias*, attachment, *capias*, or exigent.

(B 102.) Perjury; What shall be, and what not.

(B 102.) *By the common law.*] So, by the *st.* 5 *El.* 9. justices of peace may inquire of perjury and subornation, contrary to that statute.

Perjury was an offence, punished upon indictment, or information, by the common law. 3 *Inst.* 163, 164. R. 12 Co. 102. 2 Cro. 8. 5 *Mod.* 342. *Vide ante*, (B 1.)

And therefore, if a man committed perjury, he might be punished by information in the star-chamber. 12 Co. 101. *Dub. Dy.* 242. b.

As, if he take an oath before him who has lawful authority to administer, and swear positively and falsely in a material point. 3 *Inst.* 164. *Vide Serement.*

And perjury shall be punished, tho' it be committed by a witness for the king, in an information against others. 12 Co. 101. 3 *Inst.* 164. R. *per two* *J.* 2 Cro. 212.

So, perjury in an answer in *Chancery* or *Exchequer*, shall be punished by the common law. 5 *Mod.* 348. 3 *Inst.* 166.

Or, in answer to interrogatories. 5 *Mod.* 348.

Or,

Or, in an *affidavit* in *B. R. C. B. or Chancery*, &c. 5 *Mod.* 348.  
*3bo.* 335. 397. *Per Coke*, 1 *Rel.* 79.

Or, upon a wager of law. *Noy*, 128.

Or, upon a commission for examination of witnesses.

Tho' the examination was after the commission determined by the death of the king; if his death was not known. *R. Cro. Car.* 99.

So, perjury in a court not of record: as, in a court-baron.  
 5 *Mod.* 348. *Per Twissd.* 1 *Mod.* 55.

Or, an ecclesiastical court. 5 *Mod.* 348.

In an *affidavit* made for obtaining a licence of marriage. 1 *Vent.* 370.

So, it will be perjury by the common law to swear a thing not known by him, tho' it be not false. *R. Pal.* 294. 3 *Inst.* 166.

As, that *A.* in his presence, revoked his will, tho' he did it in his absence. *R. Het.* 97.

But it will not be perjury if a man take a false oath before him who has no lawful authority to administer it. 3 *Inst.* 165, 166.

Or, before him who has no jurisdiction of the cause. 3 *Inst.* 166.  
*R. Yel.* 111.

So, it will not be perjury, if the oath be not direct and positive: as, if he say, *ut meminit*, &c. 3 *Inst.* 166.

If an answer in *Chancery* be false in a thing, which is not said to be of his knowledge, but of his belief. *R.* 1 *Sid.* 419.

So, it will not be perjury, unless it be in a point material to the issue. 3 *Inst.* 167.

As, if it be asked, whether payment was made for such goods at one time, and he says, it was; it will not be perjury, if payment was made, tho' not all at the same time. *R.* 2 *Rel.* 41, 42.

If he swear that he beat and wounded *A.* with his sword, it is not perjury if it was with a stick; for all that is material is the battery and wounding. *R. Het.* 97.

But it is sufficient, if it be in any degree material: as, if he be perjured directly in his answer in *Chancery*, tho' it be in a matter not charged by the bill. 5 *Mod.* 348. *Semb.* 1 *Sid.* 274. 106.

If he be perjured in his testimony as to the credit of a witness. *R. Sal.* 514.

But a man shall not be indicted for perjury, for breach of an oath of his office: as, a judge, sheriff, bailiff, or other officer.

So, he shall not be indicted for perjury, if the matter be explained by another part of the answer, *affidavit*, &c.

Or, by a subsequent answer. 1 *Sid.* 419.

(B 103.) By the *st.* 5 *El.* 9.] So, by the *st.* 5 *El.* 9. a person who procures any witness to commit wilful and corrupt perjury, in any cause depending by writ, action, bill, plaint, or information in *Chancery*, star-chamber, or any court of record, leet, frank-pledge, ancient demesne, hundred, court-baron, or court of stannaries, or a witness in *perpetuam rei memoriam*, shall forfeit 40*l.* or suffer imprisonment for half a year, and stand in the pillory an hour in full market, and be disabled to be a witness, &c.

And a person, who by subornation, or his own act, commits wilful perjury, &c. shall forfeit 20*l.* and be imprisoned for six months, and be disabled to be a witness; and if he have not 20*l.* to be set on the



the pillory in a market-place, &c. and have his ears nailed, and be disabled to be a witness; a moiety of the forfeitures to the queen, a moiety to the party grieved, &c.

And upon this statute the party grieved shall have his action. 3 *Bul.* 147.

Persons grieved ought not to join in the action another who does not appear to be aggrieved. *Per two J.* 2 *Leo.* 12.

So, the declaration is not good, unless it describes the lands in regard of which the perjury was committed. 2 *Leo.* 12.

The plaintiff may sue for a manifest perjury, as the party grieved, tho' the verdict be for him. *Ley*, 66, 7.

So, an action for perjury lies against a Jew, tho' sworn upon the *Pentateuch* only. 2 *Keb.* 314.

Or, a witness sworn upon the book of common prayer, having the gospels and epistles. 2 *Keb.* 314. [*Cont. per Windham* of a psalm book only.]

A person will be perjured within the *st.* 5 *El.* 9. if he swears falsely and positively in any trial, to the proof of the point in issue.

Or, to a circumstance which conduces to the proof of the issue, tho' it never was material whether such circumstance were true: as, that the beasts of *B.* were in such a close, because they have such a mark: where *B.* never used such mark. *Per two J.* *Dod. cont. Pal.* 535. 2 *Rol.* 368.

But a man is not punishable by this statute, if he perjure himself in an answer in *Chancery*, or the *Exchequer*, for it extends only to witnesses. 3 *Inst.* 166.

In an answer by a defendant to interrogatories in the star-chamber. *R. Yel.* 120. *Cro. El.* 148.

Or, in a deposition for one, who is a party to the cause *a latere*: as, where a man comes in upon *aide prier*. *Dub. Yel.* 22.

Or, is added as a party by order in *Chancery*, upon a bill between other persons. *R. Yel.* 22.

So, if the perjury be in the spiritual court; for it is excepted by the *st.* 5 *El.* 9.

(*B* 104.) *How it shall be punished. By indictment.*] Perjury was indictable by the common law. *Vide action by the party grieved, ante, (B* 103.)

And an indictment lies for it in *B. R.* tho' the perjury was in another court. *R. Pal.* 294. 2 *Rol.* 244.

So, an indictment, &c. lies against a witness for perjury, tho' the party be convicted upon his evidence. *Ley*, 69.

But an indictment does not lie, upon the *st.* 5 *El.* 9. for perjury by a witness, who deposes for the king, in an information by the attorney-general in the *Exchequer*. *R.* 2 *Cro.* 120. *Adm.* 2 *Cro.* 212.

Or, upon an indictment. *R.* 5 *Co.* 99. *a.*

So, an indictment does not lie upon the statute, for perjury in his own cause: as, upon a wager of law. *R. Noy*, 128.

So, it does not lie, where the perjury was not as a witness, or in *perpetuam rei memoriam*: as, if perjury be committed in an answer and upon an examination to interrogatories in the star-chamber. *R. Cro. El.* 148. *Yel.* 120. *Vide ante, (B* 103.)

If the perjury be in a court of *Westminster*, and the party confess it; his confession being recorded, he may be set in the pillory, without indictment. 2 *Mod. Ca.* 179.

Tho' the perjury was in *C. B. &c.* 2 *Mod. Ca.* 179.

An indictment for perjury ought to shew that it was done *voluntariè*. *R. Sho.* 190. 3 *Inst.* 167.

It ought to shew the exact breach: and therefore, an indictment for swearing, that *A.* acknowledge that he was treated at *N. ubi revera A.* did not acknowledge, that he was treated at the city of *N.* is not a good breach. *R. Sho.* 335.

That *A.* suborned *B.* to take an oath that such a one was present at a conventicle; without saying that *B.* swore so. *Semb.* 3 *Mod.* 122.

If the perjury be at a trial, it must shew, what was the issue, and how the evidence tended to the issue. *R. Cro. El.* 148. 2 *Rol.* 429.

[In an indictment for perjury committed at an admiralty session, where the commission was directed to *A., B.* and *C.* and others not named, of whom *A., B.* and *C.* were amongst others *to be one*; the court will take it to mean that if either of the persons named of the *quorum* were present, it would be sufficient, stating that at such a court *J. K.* was in due form of law tried upon a certain indictment then and there depending against him for murder; and that at and upon the said trial it then and there became and was a material question, whether, &c. are sufficient averments that the perjury was committed on the trial of *J. K.* for the murder; and that the question on which the perjury was assigned was material on the trial. *Rex v. Dowlin, T.* 33 *Geo.* 3. 5 *T. R.* 311.]

[An indictment for perjury assigned on an affidavit sworn before the court need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. *Rex v. Crofley, T.* 37 *Geo.* 3. 7 *T. R.* 315.]

[Perjury may be assigned upon the affidavit of an attorney of the court, made in answer to a charge exhibited against him in a summary way for having in his possession blank pieces of paper with affidavit stamps and the signatures of a master extraordinary in *Chancery*, and another person at the bottom of the papers. *Ibid.*]

[It is no objection to such an indictment that it is not stated where the court was holden, where the original application was made, or when the rule was made calling on the defendant to answer the charge, a sufficient venue being laid to the fact of taking the false oath. *Ibid.*]

[It must state a legal authority to administer an oath. *Doug.* 156. 1 *T. R.* 69.]

[There must be an allegation of time and place, which are sometimes material and necessary to be laid with precision, and sometimes not. And where time is not material, it needs not be positively averred, and if under a *videlicet*, it may be rejected. 1 *T. R.* 70.]

If the perjury was before a commissioner of the *Chancery*, it must shew the commission under the great seal, so that there was a power to take the oath. *R.* 2 *Rol.* 429.

So, there ought to be the same certainty in an information at common law, as upon the statute. *Sal.* 514.

The indictment ought to shew, whether he committed the perjury by subornation, or on his own accord. 3 *Inst.* 167.

And shall say, *falso voluntariè & corruptè dixit*; for a conclusion, *et sic commisit voluntarium & corruptum perjurium*, is not sufficient. 4 *Inst.* 167.

[On perjury in an answer in *Chancery*, it is not necessary to prove the identity of the person who swore it, nor that any person swore it; it is sufficient if his hand-writing is proved, and that the master proves that the *jurat.* was subscribed by him (the master) as being sworn before him. *Rex v. Morris*, T. 1 *Geo.* 3. 2 *B. M.* 1189.]

[By *st.* 23 *Geo.* 2. c. 11. in information or indictment, it is sufficient to set forth the substance of the offence, and before what court or person, with averment of the authority to administer oath, and averment to falsify the matter wherein perjury is assigned, without setting forth the proceedings or the authority.]

[So, for subornation.]

[Justices of assize may order a witness to be prosecuted, and assign counsel; and the prosecution shall be without tax, duty, or fee.]

[Perjury being committed in the booth-hall, within the limits of the county of a city, on the trial of a cause before a jury of the county at large, the indictment may be found and tried by juries of the county at large. *Doug.* 791.]

[Perjury committed at the *Old Bailey*, on a trial before a *Middlesex* jury, is laid in, and tried by a jury of the city of *London*. *Doug.* 794.]

As to action upon the statute, *vide ante*, (B 133.)

(B 105.) *Indictment for subornation.*] So, an indictment lies for subornation. *Vide ante*, (B 104.)

So, for giving 350*l.* to *A.* to prove a writing given in evidence for another to be forged; for it tends to subornation. *R.* 2 *Sho.* 1.

(B 106.) *What judgment for perjury.*] For the judgment upon an indictment, or information for perjury at the common law, *vide* 3 *Inst.* 163.

By consequence of the judgment upon an indictment or information for perjury at the common law, the party shall be disabled from being a witness, till he be pardoned. *Sal.* 514. *Vide Testimony*, (A 4.)

In an indictment, or information for perjury, upon the statute, the judgment shall be to forfeit 20*l.* and be imprisoned for six months without bail or mainprize, and his oath from thenceforth not to be received in any court of record, until the judgment shall be reversed. And if the offender have not goods or chattels to the value of 20*l.* then to be set on the pillory in a market-place, within the shire, &c. and to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any court of record, until the judgment be reversed. *Vide the st.* 5 *El.* 9.

And the disability of being a witness, being part of the judgment, cannot be pardoned; nor shall the party be restored, but by reversal of the judgment. *Sal.* 514.

But judgment shall not be given, unless the party be present in court. *Skin.* 684.



Tho' he be outlawed for it; for a *capias* ought to issue, upon which he shall be brought into court. *Skin.* 684.

(B 107.) Conspiracy.

Justices of *oyer and terminer* have authority to inquire of confederacies. 1 *Sal.* 174.

And therefore an indictment lies for a conspiracy of indicting for any offence temporal or ecclesiastical falsely, tho' nothing be done in execution of the conspiracy. *R.* 1 *Sal.* 174.

As, for conspiring to charge a man with being father of a bastard. *R.* 1 *Sal.* 174.

Tho' it does not aver that he is innocent; for it shall be intended, where he charges falsely. 1 *Sal.* 174.

[One conspirator may be convicted after the other is dead, or before he has pleaded. *Rex v. Niccols*, *P.* 18 *Geo.* 2. *Str.* 1227.]

[If several persons, in order to get the rewards for apprehending highwaymen, agree that one of them shall procure a man to rob another of them, which is done, they may be indicted, and on conviction sentenced to stand in the pillory twice, to be imprisoned seven years, and, till they find sureties, for three years more. *Macdaniel's Case*, 121. *T.* 1755, *Foster*, 121.]

[Indictment for a conspiracy falsely to accuse a man of taking hair out of a bag, the goods of *A.* and exacting money and notes from him, as a composition for not prosecuting, lies before quarter-sessions; for a conspiracy is a trespass, and tends to the breach of the peace. *Rex v. Rispsal*, *T.* 2 *Geo.* 3. 3 *B. M.* 1320.]

[Such indictment is good, tho' it does not say, taking unlawfully or feloniously. *Ibid.*]

(B 108.) In what cases Justices of Peace have no Authority, *vide ante*, (B 1. 3.)

(C) Conviction by Justices of Peace.

(C 1.) In what Cases necessary.

[If a statute inflicts a penalty, for an offence to be determined by one or more justices of peace out of sessions, there must be a conviction for the offence before the penalty levied. *Vide* 1 *Str.* 127.

And such conviction ought to be made in due form.

[*Quare*, Whether a person can be convicted of two distinct penalties in the same information? *Rex v. Salomons*, *E.* 26 *Geo.* 3. 1 *T. R.* 249.]

[Only one penalty can be incurred on the same day on the *stat.* 5 *Ann.* c. 14. for the better preservation of the game. *Marriott v. Shaw*, *C. P. E.* 4 *Geo.* 1. (*Com.* 274.) *Rex v. Matthews*, *T.* 10 *Ann.* 10 *Mod.* 26.]

[Nor, on the *stat.* 29 *Car.* 2. c. 7. "for the better observation of the Lord's day." *Cripps v. Durden*, *B. R. T.* 17 *Geo.* 3. *Cowp.* 640.]

[Two penalties may be incurred on the same day on the *st.* 12 *G.* 2. c. 36.]

[For selling books originally written and published here, and afterwards reprinted in any other country, and imported into this, if the acts of sale be distinct. *Brooke v. Milliken*, B. R. M. 30 Geo. 3. 3 T. R. 509.]

(C 2.) In what Manner.

(C 2.) *There must be a summons to the defendant.* A conviction ought to be made in the manner the law requires. *Vide ante*, (B 47.)

[A conviction for the said offence, where there are two distinct offences charged in the information, is bad. *Rex v. Salomons*, E. 26 G. 3. 1 T. R. 249.]

[A conviction must be good in all its parts; the information must be supported by the evidence, and the judgment must be supported by both: a judgment for too little is as bad as a judgment for too much. *Ibid.*]

[In convictions the utmost strictness and certainty are required. 2 T. R. 471.]

And therefore the defendant must be summoned before he be condemned.

[But defect in the summons is cured by the defendant's appearance. *Rex v. Johnson*, M. 6 Geo. Str. 261.]

If the conviction does not shew the defendant to be summoned, it shall be quashed. *Mod. Ca.* 41.

So, if it does not shew a summons at a possible day: as, if he says, whereas A. was summoned to appear, and did appear on *Tuesday 17th April*, where the 17th April was *Friday*. R. 1 Sal. 181. *Mod. Ca.* 41.

And where the day mentioned for appearance is impossible, his appearance upon another day shall not be intended. 1 Sal. 181. *Mod. Ca.* 41.

[If the summons, appearance and conviction, be laid to be on a day prior to the information and examination of the witness, it is bad. *Rex v. Kent*, M. 2 Geo. 2. *Ld. Raym.* 1546.]

[In convictions the evidence must be set out. *Rex v. Theed*, M. 5 Geo. 2. Str. 919. *Rex v. Lloyd*, M. 8 Geo. 2. D. *Per Hardwick* C. J. It is fully settled. Str. 996. *Rex v. Bryan*, H. 11 Geo. 2. *Andr.* 81. *Rex v. Vipont*, T. 1 Geo. 3. 2 B. M. 1163. *Dougl.* 486. *Rex v. Thompson*, T. 27 Geo. 3. 2 T. R. 18. *Rex v. Benwell*, M. 35 Geo. 3. 6 T. R. 75. *Rex v. Clarke*, E. 39 Geo. 3. 8 T. R. 220.]

[So, 'tis not sufficient to say, "the charge as set forth being proved on oath of A. and B." *Rex v. Killet*, P. 7 Geo. 3. 4 B. M. 2063. In orders it is not necessary.]

[The evidence must be given in defendant's presence, unless he confesses. *Rex v. Vipont*, P. 1 Geo. 3. 2 B. M. 1163.]

[The offender should be called on to plead to the charge, before any evidence in support of it is given; but if the evidence is given first, tho' not in his presence, and he confesses the offence, the irregularity is cured. *Rex v. Hall*, T. 26 Geo. 3. 1 T. R. 320.]

[But it is sufficient if enough appear to shew that the evidence was given in the presence of the defendant, without expressly stating that he was present at the time. *Coup.* 241.]

[And

[And it is not sufficient to read over the deposition in the defendant's presence; the witness must be actually sworn and examined in his presence. 1 T. R. 125. cont. 2 Str. 1240.]

[But if the defendant appear and plead, and the evidence be given on the same day, the court of B. R. will intend that the evidence was given in the defendant's presence, unless the contrary appear. 2 T. R. 18. *Rex v. Lovet*, H. 37 Geo. 3. 7 T. R. 152.]

[A magistrate should state all the evidence in the conviction, and not merely the result of it. *Ibid.*]

[In a conviction, if the defendant appear and plead, and the evidence be given on the same day, the court will intend that the evidence was given in the defendant's presence, even tho' it be stated that the appearance was at A. and that the evidence was given at B. *Rex v. Swallow*, T. 39 Geo. 3. 8 T. R. 284.]

[A defendant may be convicted of several offences in the same conviction. *Ibid.*]

[There must be a judgment in the conviction. 2 Burr. 1163.]

[If a conviction do not state an adjudication, it cannot be supported, whether the punishment be or be not fixed by statute. *Rex v. Harris*, E. 37 Geo. 3. 7 T. R. 238.]

[Omission of proof to shew the offence within a statute shall not be helpt, by the conclusion of the conviction, *contra formam statuti*. *Dub. Skin.* 562.]

[If the defendant is convicted on the evidence of the informer who is entitled to part of the penalty, it is bad. *Rex v. Tilly*, T. 6 Geo. Str. 316. *Rex v. Piercy*, T. 10 & 11 Geo. 2. *Andr.* 18. *Rex v. Blaney*, T. 11 & 12 Geo. 2. *Andr.* 240.]

[If the statute requires that the conviction be by justices of the county where the offence was committed, it must appear on the conviction, or it will be quashed. *Ibid.* *Rex v. Johnson*, M. 6 Geo. Str. 261.]

[If it appears on the conviction, that the witness swore generally that the defendant was guilty of the premises, it is bad; for he took on himself to swear the law. *Rex v. Baker*, T. 6 Geo. Str. 316.]

[Proof that the defendant "did keep and use a gun to kill and destroy the game" is sufficient evidence to support a conviction on the game laws, tho' the witness had his reason for believing it, that the gun was fired by the defendant, who was walking about a piece of ground at H. with that apparent intent. *Rex v. Davis*, H. 35 G. 3. 6 T. R. 177.]

[If there be any evidence tending to prove the offence, the court of B. R. cannot judge of the degree of it, or control the magistrate's determination upon that evidence. *Ibid.*]

[It is sufficient in convictions, if there were such evidence before a magistrate, as in an action would be sufficient to be left to a jury. *Ibid.*]

[On a question of qualification of a defendant for killing game, the convicting magistrates may ground their opinion of his not being qualified on the fact of the defendant's having on a former day sworn under the income act to an estate under 100*l.* a-year. *Rex v. Clarke*, E. 39 Geo. 3. 8 T. R. 220.]



[If justices acquit a defendant, against whom an information is laid before them for a penalty, the court of *B. R.* cannot reverse the judgment, tho' the justices state (on a return to a *certiorari* to remove the proceedings into *B. R.*) evidence which *prima facie* is sufficient to convict, and not any contradictory or explanatory evidence. *Rex v. Reason*, *T. 35 Geo. 3. 6 T. R. 375.*]

[A conviction shall be presumed to be right, if it does not appear to be wrong; as, if one is convicted for obstructing an excise-officer, the court will presume it was in the day-time. *Rex v. Theed*, *M. 11 G. 2 Ld. Raym. 1375. Str. 608.*]

[Proceedings upon convictions must be in the present tense. *Rex v. Roberts*, *M. 11 Geo. Str. 608.*]

[But it is no objection to a conviction that it states that the informer *came* and *gave* the justices to be informed, &c. in the past tense. *1 T. R. 320.*]

[In convictions for non-payment of money, (as collector of a turnpike,) the sum, and times when received, must be mentioned. *Rex v. Catherall*, *P. 4 Geo. Str. 900.*]

[An excuse in a proviso need not be taken notice of in a conviction; but if it is in an enacting clause, it must. *Rex v. Bryan*, *M. 12 G. 2, Str. 1101. Andr. 289.*]

[In convictions on negative acts of parliament, the particular qualifications mentioned in the purview of them must be negatively specified in them; as, on the game laws, all the qualifications mentioned in 22 & 23 *Car. 2. Rex v. Jarvis*, *H. 30 Geo. 2. 1 B. M. 148. Doug. 345. Vide ante, (B 43.) Rex v. Pratten*, *H. 36 Geo. 3. 6 T. R. 559.*]

[It needs not negative every particular qualification; that may be impossible from the nature of the case. *1 T. R. 127.*]

[Where the prosecutor is not obliged to negative the exceptions in a statute, and he negatives some of them only, that part of the information will be rejected as surplusage. *Rex v. Hall*, *T. 26 Geo. 3. 3 T. R. 320.*]

[If a conviction under the *stat. 31 Geo. 3. c. 21. s. 4.* which enacts that all convictions against that act may be made out "in the form or to the effect following," (giving the form,) contain all the substantial parts of the form prescribed, it is good, altho' it contain something more; for surplusage will not vitiate a conviction. *Rex v. Jefferies*, *T. 32 Geo. 3. 4 T. R. 767.*]

[Where justices of peace are required by a penal statute to distribute the penalty, on conviction, among certain persons according to their discretion, they must adjudge what the several portions shall be: an adjudication that the forfeiture *be disposed of as the law directs*, is bad. *2 T. R. 96.*]

[A conviction adjudging a distribution of part of a forfeiture (which a statute says shall be paid to the overseers of the poor of the parish for the use of the poor of the parish) to the overseers of the poor of a township, cannot be supported. *Rex v. Priest*, *H. 36 Geo. 3. 6 T. R. 538.*]

[*Qu.* Whether the conviction could be supported if it had appeared on the face of it that the township separately maintained its own poor? *Ibid.*]

[Convictions ought to be construed with strictness, because they must be taken to be true against defendant. *Rex v. Little*, T. 31 G. 2. 1 B. M. 609. *Rex v. Corden*, H. 9 Geo. 3. 4 B. M. 2279.]

[There must be an averment of the crime. *Ibid.*]

[If the information is that *A.* was found trading as a hawker, and offered to sale, &c. and *A.* confesses he offered to sale in *such manner* as is mentioned, this is not sufficient; he must confess that he traded as a hawker, &c. *Ibid.*]

[A conviction for trading as a hawker *without having* a licence, in which the evidence stated is, "that he *refused to produce* a licence," is good. *Rex v. Smith*, P. 4 Geo. 3. 3 B. M. 1475.]

[Conviction of a hawker is good, tho' it doth not appear that he was summoned, that the witness was examined in his presence, and tho' he does not swear him to be a hawker at the time of conviction, if it is set forth that he appeared and denied the guilt, and desired no further time, and that he exposed goods to sale two days before the conviction. *Rex v. Aiken*, M. 6 Geo. 3. 2 B. M. 1785. 2 T. R. 18.]

[A conviction on 5 Geo. 3. c. 14. for preserving fish, must be on complaint of the owner, or he must shew his dissent to the fishing; the property must be proved on oath. Confession of the offence does not supply these. *Rex v. Corden*, H. 9 Geo. 3. 4 B. M. 2279.]

[If a subsequent statute make an exception to a former one, it is incumbent on the defendant to shew, by way of defence, that he comes within such exception. *Rex v. Hall*, T. 26 Geo. 3. 1 T. R. 322.]

[*Feme-covert* may be convicted for a crime which can be committed by her alone; as, for selling gin contrary to 9 Geo. 2. c. 23. *Rex v. Crofts*, M. 13 G. 2. Str. 1120.]

[In a conviction on the lottery act of 22 Geo. 3. c. 47. the evidence must state the offence to have been committed where it is laid. 1 T. R. 241.]

[A justice ought to give defendant a copy of conviction, if he demands it: it is a record, and he is entitled to it. *Rex v. Midlam*, T. 5 Geo. 3. 3 B. M. 1720.]

[If an order is good in substance, it is sufficient, and it need not be literally so strict as an indictment; thus, an alternative charge, as aiding in removing or concealing goods, (on stat. 11 Geo. 2. c. 19) is good. *Rex v. Middleburgh*, T. 30 & 31 Geo. 2. 1 B. M. 399.]

[An order against a man for aiding in removing or concealing goods, is good, tho' it doth not state that the tenant removed them. *Ibid.*]

[The offence for which the party is convicted must be clearly within the statute which inflicts the punishment adjudged in the conviction. Therefore, playing at bowls not constituting an idle and disorderly person, under 17 Geo. 2. c. 5. a conviction for playing at bowls, which inflicted the punishment prescribed by that statute for idle and disorderly persons, was quashed. *Cowp.* 37.]

[So, a conviction on the 22 Geo. 3. c. 47. for insuring a ticket in the lottery authorized by 25 Geo. 3. was quashed, because the information did not state that the ticket on which the insurance was made was a ticket in the *state lottery*. 1 T. R. 222.]

[If a statute which creates an offence make part of the punishment the payment of the *costs*, those must be ascertained by the conviction, otherwise it will be bad. *Cowp.* 60.]

[Where the conviction, after stating the evidence, stated "thereupon the defendant on, &c. at, &c. before me, &c. by the oath of one credible witness, according to the form of the statute, is convicted;" it was holden to be an adjudication of the justice that he is *convicted of the offence*. *Rex v. Thompson*, T. 27 Geo. 3. 2 T. R. 18.]

(C 3.) Remedy upon an undue Conviction.

A justice of peace is a judge of record; and if he acts within his jurisdiction pursuant to a statute, his judgment on conviction shall not be avoided by *B. R.* nor the party in execution upon it set at large. *Jon.* 171.

But if a justice of peace does not pursue the statute, his proceeding is void, and *coram non judice*; and there shall be redress by *B. R.* upon removal of the conviction or order before them by *certiorari*. *Ibid.*

[The court, on deciding on the legality of a conviction, cannot take cognizance of any fact contained in the *certiorari*, by which the conviction is removed. *Rex v. Lifson*, T. 33 Geo. 3. 5 T. R. 338.]

[The court refused to quash a conviction on the *stat.* 12 Geo. 2. c. 28. directing the penalty to be distributed according to that act, tho' it appeared in the *certiorari* that the conviction was made at one of the seven public offices established by the *stat.* 32 Geo. 3. c. 53. which directs that all penalties levied by the justices under that act shall be paid to the receivers appointed by the same. *Ibid.*]

[Every conviction may be removed into *B. R.* by *certiorari*, unless when the power is expressly taken away by statute. *Doug.* 549.]

And that, without writ of error. *Jon.* 171.

[If a justice of peace convict a person of more than one offence on the same day in exercising his calling on a Sunday (contrary to *stat.* 29 Car. 2. c. 7.) it is an excess of jurisdiction, for which an action will lie, before the convictions are quashed. *Cowp.* 640.]

[A conviction on this statute, for baking dinners on a Sunday, was quashed, because bakers are not prohibited thereby for baking for their customers. *Rex v. Younger*, M. 34 Geo. 3. 5 T. R. 449. 2 Burr. 787.]

[On an information upon the *stat.* 7 Geo. 2. c. 19. s. 2. the defendant was convicted for having mixed the vapour of sulphur and brimstone with hops; and the conviction was holden good, it being deemed an offence within the statute. *Rex v. Pack*, T. 35 Geo. 3. 6 T. R. 374.]

[Justices ought in all cases to return convictions to the sessions whether an appeal lies or not, that the crown may not be deprived of its share of the forfeitures: and when that is done a return of a copy to a *certiorari* is good. 2 T. R. 285.]

(D i.) Sessions of Justices of Peace.

**J**USTICES of peace may hold their sessions for the administration of justice within their precincts. *Vide Dalt.* 650. c. 185.

And their sessions are petit, general, or quarter sessions.

An assembly of two justices, or more, (*quorum unus*;) not only for inquiry, but also to hear and determine, makes a session. *Lamb.* Tho' 73 374. / 4. c. 1.



Tho' the quarter-session is a general session, yet there may be a general session of the peace at a different time. *Lut.* 911.

The whole session is but one day in law. *Sal.* 607.

And if it be said to be held the 20th and 27th of *October*, it will be bad. *R. Sal.* 605.

Persons *eundo & redeundo* to and from sessions have the privilege of not being arrested. *Semb.* 1 *Lev.* 159.

And if such person be arrested *in facie curia*, the court will discharge him. *R.* 1 *Brownl.* 15.

But if the arrest be not *in facie curia*, the court cannot discharge him. 1 *Brownl.* 15. *Semb.* where the writ of privilege of a *custos rotulorum* was pleaded to an action for an escape, and held a bad plea. *Ray.* 100.

#### (D 2.) At what Time held.

By the *stat.* 12 *R.* 2. 10. justices of peace shall keep their sessions in every quarter of the year at least, and for three days, if need be.

And therefore, by the *stat.* 2 *H.* 5. 4. in the first week after the feast of *St. Michael*, the first week after the *Epiphany*, the first week after the clause of *Easter*, and the first week after the translation of *St. Thomas* the Martyr, and oftner, if need be.

But by the *stat.* 14 *H.* 6. 4. the justices in *Middlesex* need hold their sessions but twice a year.

#### (D 3.) How summoned.

If a sufficient number of justices of peace and others assemble, they may hold a session, tho' not summoned by precept. *Lamb.* 375, 376. *l. 4. c. 2.*

But the regular course is, that it be summoned by a precept of two justices. *Lamb.* 375. *l. 4. c. 2.*

Otherwise, none ought to be punished for default of appearance. *Lamb.* 376. *l. 4. c. 2.*

And a precept by one justice is not sufficient, tho' it be by the *custos rotulorum*; for he has no other authority for this purpose than as a justice of peace. *Lamb.* 377. *l. 4. c. 3.*

And a precept by two justices cannot be superseded by other justices of peace. *Lamb.* 378. *l. 4. c. 2.*

Yet, if two justices make a precept for a session, two others may make a precept for a session at another place. *Lamb.* 379. *l. 4. c. 2.*

And the proceedings at both places are good, for they are of equal authority. *Ibid.*

The king may make a *superfedeas* to a precept of two justices of peace. *Crom.* 7. 107. *b.* (*Vide Lamb.* 378. *l. 4. c. 2.*)

And it may be directed to the justices, or to the sheriff. *Crom.* 7. 107. *b.*

[If the sessions is once dropt and not adjourned, it cannot be resumed. *Rex v. West Torrington*, *T.* 22 & 23 *Geo.* 2. *B. S. C.* No. 105. *Rex v. Pollard*, *H.* 20 *Geo.* 2. *Str.* 1263.]

#### (D 4.) Who ought to attend.

(D 4.) *Custos rotulorum.*] By the commission in a county, the *custos rotulorum* ought to attend at the sessions with records, &c.

By

By the *stat. 37 H. 8. 1.* reciting, that the lord chancellor by reason of his office had the appointment of the *custos rotulorum* in every shire, &c. no person shall be appointed, but such as hath a bill signed by the king, to whom the chancellor shall make a commission to be *custos rotulorum*, till the king assign another by bill, &c. to hold by himself or sufficient deputy learned in the law.

But by the *stat. 3 & 4 Ed. 6. 1.* the lord chancellor, &c. may appoint the *custos rotulorum* to exercise by himself or deputy, as before *37 H. 8.* without bill signed by the king.

Provided the archbishop of York, bishops of Durham, Ely, chancellor of the duchy of Lancaster, or any corporation, or other who have authority by patent, or otherwise, to constitute a *custos rotulorum* for any place, may still do so.

And there was the same proviso in the *stat. 37 H. 8. 1.*

And now, by the *stat. 1 W. & M. 21. f. 4.* the *custos rotulorum* shall be appointed as directed by the *stat. 37 H. 8. 1.*

After justices of peace were made judges of record by the *stat. 34 Ed. 3. 1.* it was convenient that the king should appoint one in the commission to have the custody of the rolls and records of the court, who is the *custos rotulorum*. *Per Holt, Sho. 528.*

And thereupon, the chancellor *virtute officii*, without other warrant, makes a commission or grant to him to be *custos rotulorum*, which was virtually the appointment of the king, for the commission was in the king's name. *Per Holt, Sho. 529.*

But all the records of the sessions of the peace are, in reputation of law, in the custody of all the justices; and a *certiorari* to remove any of them is directed to the justices generally. *Per Holt, Sho. 528, 529.*

And the king shall not make a person, not in the commission, *custos rotulorum*. *Sho. 529.*

(D 5.) *Clerk of the peace.*] By the *stat. 37 H. 8. 1.* reciting, that the *custos rotulorum* used to appoint the clerk of the peace, &c. the *custos rotulorum* shall in every shire appoint such able person, instructed in the law, as shall be fit for the office, during such time as he continues *custos rotulorum*, so he demean himself justly, &c. to exercise by him, or his deputy learned in the law, and admitted as such by the *custos rotulorum*.

And by common equity, the *custos rotulorum*, having the custody of the records, ought to appoint the clerk with whom they shall be entrusted. *Per Holt, Sho. 530.*

By the *stat. 1 W. & M. 21. f. 5.* the *custos rotulorum* shall appoint a clerk of the peace, able and residing in the same county, to execute the office by himself, or sufficient deputy, and to receive the fees, &c. as long as he shall well demean himself in the said office.

And therefore, a *custos rotulorum* having made a clerk of the peace since this statute, he has the office for life *quamdiu se bene gesserit*. *R. Tr. 5 W. & M. Harcourt and Fox, and afterwards affirmed in Parl. 1 Sho. 427. 506. 516. 536. (Vide Sho. 556.) Ca. Parl. 163, 4 Mod. 167.*

And the *custos rotulorum* cannot make him for years, or *durante bene placito*, or for the continuance of his office. *Per Holt, Sho. 535.*

He may be made without deed; for the *custos rotulorum* has but a nomination. *R. Sel. 467.* But

But by the *stat. 1 W. & M. 21. f. 6.* if a clerk of the peace misde-mean himself in his office, and a charge in writing of his misde-meanors be exhibited to the justices at the general quarter-sessions, on examination and due proof openly in the quarter-sessions, they may suspend or discharge him; and the *custos rotulorum* may appoint another; or, if he refuse to do so before next quarter-sessions, the justices of peace at their general quarter-sessions may do so.

And if the *custos rotulorum* sell, or take bond, &c. for any reward, &c. directly or indirectly to himself, or any other, for his appointing such clerk of the peace, both shall forfeit double the value of the sum given, and are disabled to hold their offices: and the clerk of the peace shall in open sessions swear, that he hath not, nor will give any such reward, &c.

And therefore, where he extorts in his fees, or commits other misde-meanor in his office, articles may be exhibited against him before the justices at the quarter-sessions, and upon proof of them in a summary way, he shall be suspended or discharged. *Mod. Ca. 192.*

And the forfeiture shall not be purged, by surrender of his office to the *custos rotulorum*, and taking a new grant. *Mod. Ca. 193.*

And if he be suspended or discharged by the justices, the *custos rotulorum* cannot make a grant to the same person. *Per Holt, Mod. Ca. 193.*

If he be charged before the justices at quarter-sessions, and the matter is adjourned to another sessions, he may be there convicted, tho' the same justices were not then present. *Mod. Ca. 192.*

So, if a clerk of the peace refuse the delivery of the rolls to the *custos rotulorum*, he may be indicted, and, after conviction, removed, and shall not be restored by *mandamus*. *Per three J. Holt cont. 4 Mod. 32.*

But without articles, or complaint in writing, he cannot be removed. *R. Sho. 282.*

And the facts, alleged by the articles, must be charged with the same certainty as in an indictment. *R. Mod. Ca. 192.*

And if the conviction be, for causes not charged with certainty, or not chargeable against him as a misdemeanor in his office, it may be removed by *certiorari*, and quashed in *B. R.* *Mod. Ca. 192.*

Yet, after a conviction quashed, he may be charged *de novo*. *Per Holt, Mod. Ca. 193.*

[When clerk of the peace is removed by quarter-sessions, on *1 W. & M. c. 21.* it is not by conviction, but by order, and the evidence need not be set out. *Rex v. Lloyd, M. 8 Geo. 2. Sir. 996.*]

(D 6.) *Sheriff.*] By the commission the sheriff shall attend at the sessions; and so it is commanded him by the precept made to summon the sessions. (*Vide Lamb. 377. l. 4. c. 2.*)

(D 7.) *Coroners, stewards, constables, bailiffs.*] By the precept for summoning the sessions, it is commanded to the sheriff, *quod scire faciat omnibus coronatoribus, seneschallis, constabulariis, sub-constabulariis, & ballivis, quod sint tunc ibi, &c.* (*Vide Lamb. 377. l. 4. c. 2.*)

And if they do not appear, the justices of peace may amerce them. (*Vide Lamb. 391. l. 4. c. 3.*)

(D 8.)



(D 8.) *Jurors.*] By the precept it is commanded to the sheriff, *quod venire faciat tam 24 probos & legales homines de quolibet hundredo, quam 24 milites & alios probos & legales homines de corpore comitatus, &c.* (Vide Lamb. 377. l. 4. c. 2.)

By the *st.* 3 *H.* 8. 12. pannels returned for the body of the county at open sessions, &c. may be reformed by the justices of peace, by adding to or taking from the pannel; and the sheriff shall return the pannel so reformed, on pain of 20*l.* a moiety to the king, a moiety to the prosecutor.

By the *st.* 11 *H.* 4. 9. indictments shall be by inquests returned by the sheriff, &c. without nomination of the party or any person, of which none shall be outlawed, or fled to sanctuary for treason or felony.

(D 9.) Proceedings there.

At the sessions, offences shall be prosecuted by presentment, information, or indictment.

If a statute gives a penalty, to be recovered before justices of peace, without saying, in what manner, it must be by bill. *Per Holt, Sal.* 606.

[Where quarter-sessions have not original jurisdiction, consent of parties cannot give it to them. *Rex v. Hartshorn, H.* 32 *Geo.* 2. 2 *B. M.* 745.]

[The sessions of a city have jurisdiction to hear and determine indictments on 5 *El.* c. 4. *Rex v. Strong, H.* 30 *Geo.* 2. 1 *B. M.* 251.]

[If on an indictment for trespass the *nec non ad diversas felonias transgressiones, &c. audiend. & terminand. assign.* be omitted, it does not appear that they have any jurisdiction, and the indictment will be quashed. *Rex v. Carter, T.* 7 *Geo.* *Rex v. Straw, H.* 10 *Geo.* Str. 442.]

[They have a right of judging, upon appeal, with the same latitude of discretion as the two justices had. *Rex v. Gayer, H.* 30 *Geo.* 2. 1 *B. M.* 245.]

[They need give no reason in their orders, and it shall be presumed they acted on proper grounds; if they express their whole reasons, and if they are bad, their order is bad; but tho' the reasons set forth are bad, yet if the court is not obliged to judge them their whole reasons, it will presume they had others, and good ones, and their order is good. *Ibid.*]

[In all orders of sessions, the commencement must be shewn; but there is no necessity of setting out all the particular adjournments. *Rex v. Middlesex, H.* 11 *Geo.* 2. *Andr.* 101.]

[An order made at an adjourned sessions must shew that the sessions commenced within the time prescribed by the act. *Saint Michael, Norwich v. Saint Matthew, Ipswich, P.* 2 *Geo.* 2. Str. 831.]

[So, on an indictment; which, for want of it, shall be quashed. *Rex v. Saunders.* Or, judgment on it arrested after verdict. *Rex v. Fisher, P.* 3 *Geo.* 2. Str. 865.]

[The sessions, on an appeal, must make a direct and final judgment themselves, and cannot refer it to the judges of assize. *Rex v. Reading, M.* 8 *Geo.* 2. *B. R. H.* 79.]

[But they may adjourn the determination by a proper adjournment. *Ibid.*] [But

[But if the order of sessions only refers the matter to the judges of assize, who decline intermeddling, and the sessions afterwards make an order, it is void, as not being a proper adjournment. *Rex v. Reading*, *M. 8 Geo. 2. B. R. H. 79.*]

[On indictment, where they proceed as a court of record, at common law, they must make regular continuances; but *Semb.* on orders, it is not necessary. *Ibid.*]

[In orders, "whereas a presentment has been made to us, whereby it appears to us," is sufficient. *Rex v. Middlesex*, *H. 11 Geo. 2. Andr. 101.*]

[Have original jurisdiction to discharge apprentices; but the order must set forth that the master appeared or was summoned. *Rex v. Gill*, *H. 5 Geo. Str. 143.*]

[Cannot set aside assignment of an apprentice bound out by the justices. *Rex v. Barnes*, *E. 3 Geo. Str. 48.*]

If justices at sessions issue a warrant for taking any one, it must be shewn that the sessions continued by adjournment till the taking. *R. 2 Lev. 229.*

[By the *stat. 10 & 11 W. 3. c. 8.* the proprietors of navigation shares in the river *Tone* are created a corporation with certain funds, directed to keep an account of their receipts and disbursements, which shall every year be *examined, stated, corrected, and allowed* by the bishop of *B.* and *W.* and the justices of peace for the county of *Somerset*, or any five or more at their first general quarter-sessions after a certain day, at which time they are to direct a distribution of the surplus profits, if any; held that the sessions in one year have no authority to revise or correct any errors in the accounts, upon which a balance had been struck and allowed at the sessions in any preceding year. *Rex v. Tone*, *T. 39 Geo. 3. 8 T. R. 286.*]

(D 10.) *Presentment.*] As to presentment, *vide* *Indictment* (B).

(D 11.) *Information.*] As to information, *vide* title *Information*.

(D 12.) *Indictment.*] Justices of peace may take indictments of all things within their commission, or within the statutes of which they can inquire. *Vide ante*, (B 1.)—*Vide* title *Indictment*.

But indictments of things out of their cognizance they ought to reject. *Vide ante*, (B 1.)

By the *st. 1 Ed. 4. 2.* justices of peace shall proceed on indictments and presentments taken at the sheriff's turn, and delivered over to them.

But not upon an indictment taken before a coroner, justices of *eyre and terminer*, or others, except themselves or other justices of peace, or in the sheriff's turn.

(D 13.) *Traverse.*] A traverse before justices of peace shall not be tried the same day, as it may before justices in *eyre*, or gaol-delivery. *R. Jon. 379. R. Cro. Car. 438. 448. Cont. 2 Cro. 404. (Vide 2 Inst. 568.—Vide* *Indictment* (L).

Justices of peace cannot try it the same day, unless by consent. *R. 1 Sid. 99. 334.*

But

But justices of *oyer and terminer*, as well as of gaol-delivery, may try it the same day, without assent. *R. 1 Sid. 335. 2 Inst. 568. 4 Inst. 164.*

So, justices of peace in capital cases, where the offender is in custody. *Semb. per Cur.; but the Reporter makes a Quare. 1 Sid. 335; Acc. 2 Inst. 568. 4 Inst. 164.*

(D 14.) *Arraignment.*] Justices of peace may arraign felons. (*Vide Dalt. 653. c. 185. Lamb. 541, 542. l. 4. c. 14.*) *Vide Indictment (M).*

And issue a *venire facias* returnable at the same session. (*Vide Lamb. 543. l. 4. c. 14.—Vide also Dalt. 645. c. 185. Semb. cont. as to Justices of Peace, but acc. as to Justices of Gaol-Delivery.*)

And grant their clergy. *Lamb. 543. l. 4. c. 14.*

By the *stat. 34 H. 8. 14.* justices of peace may write to the clerk of the crown in *B. R.* to certify an attainer, outlawry, or conviction; which he shall do without delay, on pain of 40s.

But they cannot deliver the gaol by proclamation, as justices of gaol-delivery. *Lamb. 542. l. 4. c. 14.*

Nor, take an appeal. *Lamb. 542. l. 4. c. 14.*

Nor, award a *venire facias matrones*, if a woman be *enseint*. (*Vide Lamb. 543. l. 4. c. 14. Dub.*)

(D 15.) *Judgment, execution, &c.*] If a man be convicted before justices of peace, for a trespass, riot, &c. where no certain penalty is inflicted by statute, he shall be fined at the discretion of the justices. *Vide Indictment (N).*

But by *Mag. Ch. 9 H. 3. 14. nullus liber homo amercietur, nisi secundum modum delicti illius, salvo contentamento, &c.*

And by the *st. 1 W. & M. 1. sess. 2.* no excessive fines shall be imposed, nor unusual punishments inflicted.

If a man be convicted before justices of peace for an offence, upon which a certain penalty is inflicted, the justices must pursue the statutes in their judgments; and cannot alter or mitigate it upon confession.

And if treble damages, &c. are given to the party, the justices of peace may assess them. *Adm. Cro. Car. 448.*

But they ought first to inquire by a jury of the damages, and then give treble the damages found. *R. Cro. Car. 448, 9.*

If the defendant be present, he shall be imprisoned till payment of the fine. *2 Cro. 404.*

If he be absent, a *capias pro fine* shall issue; and so to an outlawry.

By the *stat. 51 H. 3. de Scac.* all justices, commissioners, and others, shall deliver into the *Exchequer*, at *Michaelmas*, all estreats of fines and amerciaments taxed before them; which seems to extend to justices of peace.

But by the *st. 14 R. 2. 11.* justices of peace shall make duplicates of their estreats, and deliver one part to the sheriff to levy the money. &c.

If a fine be imposed without cause, *B. R.* upon a *certiorari* may discharge it. *R. 1 Vent. 336.*

If it be excessive, *B. R.* may mitigate it. *D. 1 Vent. 336.*



By the *st.* 34 *H.* 8. 14. the clerk of the peace shall certify into *B. R.* all attainders, outlawries, and convictions before justices of peace within forty days after; or, if not in term, in twenty days of the next term, on pain of 40*s.*

By the *st.* 21 *H.* 8. 11. justices of peace may grant a writ of restitution for stolen goods, if the felon be convicted before them, by the evidence, or procurement of the owner, or party robbed.

(D 16.) *Within what time actions may be brought against justices of the peace for misconduct in their office.*—[By the *st.* 24 *Geo.* 2. *c.* 44. it is enacted, “that no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on any justice of the peace for anything by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justice of peace.”]

[The lord of a manor, who is also a justice of the peace, is entitled to this notice in an action brought against him, for taking away a gun in the house of an unqualified person, because it will be presumed that he acted as a justice. *Briggs v. Evelyn*, *C. P. T.* 32 *Geo.* 3. 2 *H. Bl.* 114.]

[A churchwarden taking a distress for a poor's-rate, under a warrant of magistrates, is entitled to the protection of this act, in having the magistrates made defendants with him in an action of trespass. *Harper v. Carr*, *B. R. E.* 37 *Geo.* 3. 7 *T. R.* 270.]

[By *st.* 6. no action shall be brought against any constable, headborough, or other officer acting in obedience to justices' warrant till demand made of the copy of the warrant and refusal thereof, &c.]

[An action of replevin to recover damages is within the meaning of this statute. *Pearson v. Roberts*, *C. P. H.* 28 *Geo.* 2. *Willes*, 668. *Milward v. Caffin*, *C. P. M.* 20 *Geo.* 3. 2 *Bl.* 1330. *contra.* *Vide Harper v. Carr*, *B. R. E.* 37 *Geo.* 3. 7 *T. R.* 274.]

[An excise officer is entitled to notice under *stat.* 23 *Geo.* 3. *c.* 70. *st.* 30. before an action of trespass can be brought against him for assaulting an innocent person, whom he suspected to be a smuggler employed in running goods, if done *bonâ fide* in the supposed execution of his duty. *Daniel v. Wilson*, *B. R. M.* 33 *Geo.* 3. 5 *T. R.* 1.]

[No action can be brought for any act done by him in that character without giving him a month's notice of the writ or process intended to be sued out, as well as of the cause of action. *Lovelace v. Curry*, *B. R. E.* 38 *Geo.* 3. 7 *T. R.* 631.]

## JUSTICIARY.

*Vide Scotland*, (D 11.)

## JUSTICES.

*Vide Country*, (C 5.)—*Quod Permittat*, (D 1.)

## JUSTIFIABLE HOMICIDE

*Vide Justices, (M 20.)*

## JUSTIFICATION.

*Vide Imprisonment, (H 8, 9.)—Pleader, (E 15.—F 19.—G 4.—O 6.—2 L 3, &c.—3 M. 15, &c.—3 O 11, &c.)*

## KEEPER.

Lord Keeper.

*Vide Chancery, (B 1.)*

## K I N.

*Vide Administration (H).—Baron and Feme, (B 4.—C 2.)—Discent, (C 1, &c.)*

## K I N G.

*Vide Roy.*

## K I N G D O M.

*Vide Chancery (4 B).—Prerogative, (D 34, 35.)—Roy, (H 1, 2.)*

## K I N G ' S B E N C H.

*Vide Courts, (B 1, &c.)—Pleader, (C 3, &c.—3 B 3.)*

## K N I G H T.

*Vide Dignity, (B 7.)—Homage, (G 4.)—Parliament, (D 5.)*

## K N I G H T ' S S E R V I C E.

*Vide Chivalry.—Guardian, (A—H 1, &c.)—Homage, (G 1, &c.)*

## L A B O U R E R S.

*Vide Chimin, (C 2, 3.)—Justices of Peace, (B 50, &c.)*

## L A C H E S.

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## L A N D S.

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## L E A S E.

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## L E E T.

## (A) Leet; Sheriff's Tourn.

**T**HE Leet is so called of the Saxon word *gelethian, convenire*.  
 4 *Inst.* 261.

And it is named, *the View of Frankpledge*, because all residents within the leet were divided in *decennies*, viz. corps of ten families, and each of the *decennie* was pledge for the other, *quod stare legi, &c.* whence the chief of the principal family was named *capitalis plegius*,  
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the others, *franci plegii*; and the court where they appeared, *visus franci plegii*. 6 Co. 77. b. 2 Inst. 73.

The sheriff's leet, or the tourn, (out of which all other leets are derived,) is the most antient court. 1 Rol. 541. l. 5. 10. 2 Inst. 72.

The tourn and leet have the same style and jurisdiction. 2 Inst. 71, 72. 4 Inst. 260. Cont. 18 H. 6. 13. b.

The tourn is a court of record held before the sheriff. 4 Inst. 260. And the sheriff himself is the judge.

And shall have all fines and amerciaments there.

By the *st. M. Ch.* 9 H. 3. 35. the sheriff shall have his tourn only *his in anno & in loco consueto*, viz. *semel post Pascha, & iterum post festum S. Mich. et visus franc. pleg. fiat ad festum S. Mich.* which is meant of a view at the tourn. 2 Inst. 72.

By the *st.* 31 Ed. 3. 15. *semel infra mensem post Pascha, & iterum infra mensem post festum S. Mich.* otherwise the sheriff shall lose his tourn for the time.

The sheriff may hold his tourn at any place within the county where he pleases.

The jurisdiction of the tourn is the same with the jurisdiction of the leet. *Quod vide post.* (L 1, &c.)

But the tourn by *M. Ch.* 9 H. 3. 17. shall not hold pleas of the crown.

So, it shall have a view of frankpledge only *semel in anno*, after *Easter*. [*Michaelmas* in the statute.] 2 Inst. 72.

So, the tourn cannot inquire of a matter within the precinct of another leet, tho' it be not presented there. 4 Inst. 261.

### (B) Leet derived from the Tourn.

**T**HE leet is a court of record derived out of the sheriff's tourn. 4 Inst. 261. 2 Inst. 71.

And shall be held before the steward; for he is the judge of the court. 4 Inst. 261. R. 6 Co. 12. 1 Rol. 541. l. 14. 2 Inst. 143.

So, there may be a court by prescription in the nature of a leet. *Semb.* 1 Leo. 217.

A leet may be claimed by charter, or the king's grant.

Or, by prescription, which supposes a grant; for it shall be intended that the king granted to the lord of the manor to have a view of the pledges and tenants resident within his manor. Co. L. 114. b. 2 Inst. 71.

So, it may be claimed as appurtenant to a manor, hundred, &c. 2 Leo. 74. *Per And.* 1 Leo. 218.

And if it belongs to an hundred, by a grant of lands in a vill parcel of the hundred, with all leets *præmissis spectan. & pertinen.*, the grantee shall not have a leet within such vill. R. Mo. 427.

So, if it belongs to a manor, and the king purchases two parts of the manor, the leet remains to the third part. 1 Bendl. pl. 30. 1 And. 26.

So, if the king grant a leet to the lord of a manor, who afterwards enfeoffs another of the manor without mentioning the leet, he retains it. Dy. 30. b.

But a man shall not have a leet in his manor within the leet of another seigniory. 1 Rol. 541. l. 10.

Yet,

Yet, there may be a superior leet, at which the resiants in an inferior leet ought to be attendant. *R. 2 Cro. 583. Dub. Cro. Car. 75. Hat. 21.*

Or, by custom, the reeve and four resiants ought to attend, and no others. *2 Cro. 583.*

And at the superior leet, a nuisance in a vill, where the inferior leet is, may be presented, if it be not presented in the inferior. *R. 2 Cro. 551.*

But that must be specially pleaded. *R. 2 Cro. 551.*

### (C) At what Time it shall be held.

**T**HE leet shall be held at the time assigned by charter. *Adm. 2 Sand. 291. 2 Inst. 72.*

Or, by prescription, it may be held at a certain day *semel*, or *bis in anno*. *2 Inst. 72. or sapius. R. 2 Leo. 28. Cro. El. 125.*

Or, upon a reasonable summons. *2 Inst. 72.*

Or, it may be prescribed to be held *semel in anno*, upon which the lord may hold it when he pleases. *Per three J. 2 Leo. 74.*

So, if the king grant it to hold *semel in anno*, without ascertaining the time. *Per two J. 2 Leo. 75.*

But if the charter or prescription does not direct otherwise, by the equity of the *st. M. Ch. 35.* it shall be held within a month after *Easter*, and a month after *Michaelmas*. *Adm. 2 Sand. 290.*

And it shall be within a lunar month. *2 Cro. 167. Vide Ann (B).*

If the leet does not appear to have been held at the lawful time, an indictment or presentment there will be void. *St. P. C. 84. b.*

If it be alleged *infra menssem*, viz. 12th Nov. it is void, for the 12th Nov. appears to be more than a month after *Michaelmas*. *R. 2 Sand. 290. 1 Vent. 107.*

If the *viz.* be rejected, then no day appears, and it might have been upon a *Sunday*, which is not *dies juridicus*. *2 Sand. 291.*

So, *infra menssem P. or Mich.* is uncertain; for it might be before as well as after. *D. Cro. Car. 275. Jon. 300.*

### (D) At what Place.

**T**HE leet may be held at any place within the feigniory, where the lord pleases. *Kit. 44. b.*

### (E) Who ought to do Suit there.

**A**FTER the leet summoned by a reasonable garnishment, and the style of the court entred, and three proclamations made, (of which *vide Copyhold, (R 7, &c.)* the suitors and resiants within the leet shall be called. *Kit. 6.) Vide Copyhold, (K 13, &c.)*

All resiants within the leet of the age of twelve years (except ecclesiastical persons, women, and barons of the realm) ought to do suit in the leet, within which they are conversant, in person. *2 Inst. 99. 121. Vide Copyhold, (K 16.)*

And after the age of twelve years, shall be sworn there to the king. *Co. Lit. 68. b. Vide Allegiance, (B 1.)*

Tho' he resides upon lands which belonged to an abbey which was exempt, and there be a grant of the privileges of the abbey. *R. 2 Rol. 56.*

If a suitor does not appear at the leet, he shall be amerced, and not distrained. *2 Inst. 118. Vide Copybold, (K 17.)*

So, the king cannot grant to another that he shall not do suit. *2 Rol. 56.*

So, one cannot do suit by attorney; for the *st. Mert. 20 H. 3. 10.* does not extend to suit real. *2 Inst. 99.*

If a man's house be within two leets, he must appear where his bed is. *2 Inst. 122.*

If he has a family in two leets, he must appear where his person is commorant. *Ibid.*

A servant is resiant where his master is. *Kit. 33. b.*

### (F) Inquest in a Leet.

**A**FTER the suitors called, and the essoigns entred, the jury ought to be impannelled and sworn. *Kit. 7.*

An inquest in a tourn or leet to make an indictment, or presentment, ought to be twelve at least. *2 Inst. 387.*

*Vide post. (G 1, 2.)*

### (G 1.) Presentment in the Leet.

**B**Y the *st. W. 2. 13 Ed. 1. 13.* no indictment or presentment in a tourn, or leet, shall be but by twelve at least. *2 Inst. 387. Kit. 7. 44. b.*

If there are not twelve present in the leet, a stranger may be sworn upon the inquest. *Kit. 7. 44, 45. b.*

And the steward may compel a stranger travelling within the leet to be sworn. *1 Rol. 542. l. 10.*

So, the steward may compel the inquest in a leet to be sworn; for the *st. of Marl. 52 H. 3. 22.* does not extend to it. *2 Inst. 143.*

If the jury refuse to present defaults of which they are informed, the steward may fine them. *Kit. 41. b.*

[The jury cannot present things subsequent to their swearing. *Semb. Moore v. Wicker, M. 11 Geo. 2. Andr. 47.*]

By the *st. W. 2. 13.* the jurors ought to put their seal to the presentment in a tourn.

[Inquisitions for offences where the party cannot be apprehended, need not be sealed; for *W. 2. c. 13.* relates only to such as are a foundation for imprisonment. Nor need they be indented; for *1 Ed. 3. stat. 2. c. 17.* relates not to presentments which were to be proceeded on in the leet, but to such as were to be delivered over to the justices. *Colebrooke v. Elliot, H. 6 Geo. 3. 3 B. M. 1859.*]

There may be a presentment for a nuisance, &c. within the leet, without notice given to the offender of the presentment; for all resiants shall be supposed present. *2 Rol. 3.*

### (G 2.) When traversable, or not.

A presentment in a tourn, or leet, by twelve of a matter within their jurisdiction, is not traversable. *Kit. 42. 44. b. Kel. 66. b.*

But



[But may be removed by *certiorari* into the court of *B. R.* and is traversable there. *Rex v. Roupell*, T. 16 Geo. 3. *Cowp.* 458.]

As, if it be for blood spilt. *Dy.* 13. *b.* *Kit.* 42. *b.*

For refusal to be sworn. *Kit.* 42. *b.*

For a nuisance. *Dub.* 3 *Mod.* 138.

But a presentment of a matter out of their conuſance will be traversable: as, of a freehold, &c. *Dy.* 13. *b.* *Kel.* 66. *b.* *Kit.* 42. *b.*

Or, the life of a man. *Kel.* 66. *b.*

So, a presentment there by a less number than twelve is traversable. *Kit.* 42. 44. *b.*

So, if a presentment by twelve be false, the party at the day of presentment shall have a writ of false presentment. *Kit.* 42. *b.*

If a matter there presentable is omitted to be presented, it may be presented in *B. R.* or *Eyre.* *Kit.* 42. *b.*

Or, upon a commission by writ for such purpose, and not otherwise, in the tourn. 4 *Inst.* 261. *Kit.* 42. *b.*

By the *st.* 1 *Ed.* 4. 2. presentments and indictments in the tourn must be transmitted to the justices of peace to proceed thereon, under the penalty of 100*l.* 2 *Inst.* 388. *R.* *Jon.* 301.

### (H) Common.Fine.

A Common fine *pro certo leta* is usually paid at *Michaelmas*, and collected by the tythingman. *Kit.* 13. *a.*

Such fine may have a lawful commencement, *viz.* for the charge of the lord in obtaining a grant of the leet, and an allowance in *Eyre.* *R.* 6 *Co.* 77. *b.* 2 *Inst.* 71.

And therefore, it shall be inquired, whether it be collected. *Kit.* 13. *a.*

If it be not paid, or collected, a bill in equity lies to enforce payment. *Dub.* 2 *Ver.* 278.

### (I) The Profits of the Lord.

SO, the leet may inquire of things which belong to the lord; as, treasure-trove. *St.* 18 *Ed.* 2.

Wreck, waifs, or estrays. *Kit.* 12, 13.

Whether a person outlawed, put in exigent, or who flies, being indicted, had goods. *Kit.* 12. *b.* 13. *a.*

Whether land be aliened in *mortmain* without licence. *Kit.* 23. *b.*

Whether a scabbed or infected horse be put upon the waste. *Kit.* 12. *b.*

So, of customs or services withheld by whom, and at what time. *St.* 18 *Ed.* 2. *Kit.* 10. *b.*

*Vide post.* (L 1, &c.)

### (K) Instruments of Correction.

BY the *st.* 51 *H.* 3. *st.* 6. every liberty ought to have a pillory of convenient strength. *Vide Tumbrel.*

And therefore, the lord of a leet ought to have pillory, tumbrel, and other instruments of correction, for offences which may be punished within the leet. *Kit.* 13. *a.* *Cro. El.* 698. *Mo.* 573.

So, he ought to have stocks, upon pain of forfeiting 5*l.* *Kit.* 13. *a.*

And the neglect is inquirable in the leet. *Kit. 13. a. Vide Cart. 29.*

And for that his liberty may be seized. *Fl. l. 2. c. 12. f. 19. Agd. Mo. 574. Cro. El. 698. R. Mo. 607.*

But a penalty cannot be assessed at the leet upon a vill for not finding them; for it belongs to the lord, not to the vill, without a special prescription. *R. Mo. 607. Semb. cont. Kit. 13. a. R. Cro. El. 698. Vide Cart. 29.*

## (L) The Jurisdiction of the Leet.

### (L 1.) In Felony.

**B**Y the common law, the leet might inquire and determine of all felonies, except homicide. *10 H. 6. 7. 2 Inst. 32. St. 18 Ed. 2. So, they might inquire of murder, or homicide. Cont. 41 Ass. 30. Acc. Kit. 9. a. 22. b. Fl. 2. c. 52.*

So, they might inquire of petit treason; as, a felony. *Kit. 9. a.*

Or, of high-treason, if it was a felony before; as, coinage, &c. *Kit. 9. a.*

So, they may inquire of a felony made by statute, where the same statute gives an inquiry to the leet.

But by the *st. M. Ch. 17. Vicecom. &c. non teneant placita corone.*

And a felony by statute is not inquirable in the leet, without express words in the same statute. *2 Inst. 181. Kit. 9. a. 22. b.*

And now no felony is determinable there; for by the *st. W. 2. 13.* an indictment for felony there shall be by twelve, who shall put their seals to it. *Sta. P. C. 84. b.*

And by the *st. 1 Ed. 3. 17.* shall be taken by indenture, whereof one part shall remain with the jurors, the other with the steward, and by him shall be delivered to the justices of assize at the next gaol-delivery for the same county. *St. P. C. 85. a. 2 Inst. 388. Kit. 8. b. 10. a.*

### (L 2.) In Cases of Misdemeanor.

(L 2.) *As escape, &c.]* By the *st. 18 Ed. 2.* the leet may inquire of an escape out of prison, and every escape of felons.

Be it voluntary or negligent. *Vide Escape, (A 1, 2.)*

So, of those who go on messages for thieves. *St. 18 Ed. 2.*

Of fugitive villeins, if they have not remained in *antient demesne* for a year and a day. *St. 18 Ed. 2.*

If women, or nuns, are carried away. *Fl. 2. c. 52.*

Or, the rape of them be not presented before the coroner. *St. 18 Ed. 2.*

If hue and cry be not pursued. *St. 18 Ed. 2. 2 Inst. 172.*

Or, levied without cause. *Fl. l. 2. c. 52.*

If persons outlawed return without the king's licence. *St. 18 Ed. 2.*

Or, a person who has abjured. *Fl. 2. c. 52.*

(L 3.) *Persons of bad fame.]* So, by the *st. 18 Ed. 2.* the leet may inquire of haunters of taverns, if they have not wherewithal to live.

So, of haunters of alehouses. *Kit. 11. a.*

So, by the *st. 18 Ed. 2.* of those who travel by night, and sleep in the day. *Of*

Of vagabonds and hazarders. *Kit. 11. a. Fl. 2. c. 52.*

So, by the *st. 18 Ed. 2.* of those who take doves by engines in winter.

Of malefactors in parks or warrens. *Fl. 2. c. 52.*

Of barretors. *Kit. 11. a.*

Of those who receive poor men for their tenants to be chargeable to the vill. *1 Rol. 542. l. 2.*

Of usurers, forcerers, apostates. *Fl. 2. c. 52.*

Of eves-droppers, who stand under walls or windows by night or by day, to hear tales, and carry them to make debate between their neighbours. *Kit. 11. a.*

Of scolds or bawlers. *Ibid.*

So, there may be an indictment for that at the quarter-sessions. *Mod. Ca. 178. 213.*

And when convicted, the proper punishment is by the cuckstole. *Per Holt, Mod. Ca. 11. 213.*

But she must be a common scold; for that is the nuisance. *Per Holt, Mod. Ca. 213.*

So, the indictment must say, *communis rixatrix*; for *commun. rixa* is error. *R. Mod. Ca. 239.*

Or, *communis calumniatrix*; for it will be reversed upon error for this. *R. Mod. Ca. 11.*

[L 4.] *Adultery.*] Antiently the leet might inquire of adultery and fornication, which now belong to the spiritual court. *3 Inst. 206.*

And therefore, an indictment does not now lie for adultery. *Per Holt, Sal. 552.*

But now they may inquire of those who maintain bawdry in their houses. *Kit. 11. a.*

And a person who keeps a bawdy-house may be indicted. *R. 1 Sal. 382. 384.*

So, a lodger, who accommodates lewd persons with his house or room, for acts of bawdry. *R. 1 Sal. 382.*

So, the husband and wife jointly. *R. 1 Sal. 384.*

So, an indictment lies for an assault with intent to ravish a woman. *Sal. 552.*

But it is not indictable, *quod in lupanario scortationem committere pro lucro procuravit.* *R. 1 Sal. 382.*

Or, *quod est communis lena.* *1 Sal. 382.*

Or, for soliciting the chastity of another. *Ibid.*

[L 5.] *Breach of the peace.*] So, the leet may inquire of all assaults or affrays. *St. 18 Ed. 2. 8 Rol. 541. l. 46.*

Of blood spilt, or any open breach of the peace. *St. 18 Ed. 2. Kit. 11. a. 23. a.*

If any wound, maim, or imprison another within the leet. *Fl. 2. c. 52.*

If a stranger make an affray, and it be not presented by the decenners. *Kit. 23. a.*

If a man break a pound, and rescue a distress. *Kit. 11. a.*

Or, rescue a man arrested. *Ibid.*

[L 6.] *Deceit. In weight or measure. What weights shall be used throughout the realm. Troy.*] By the *st. M. Ch. 9 H. 3. 25. una mensura,*



*fura, unum pondus fit per totum regnum.* So, by the *st. 27 Ed. 3. st. 2. c. 10. 14 Ed. 3. 12. Vide Justices of Peace, (B 90.)*

By the *st. 25 Ed. 3. st. 5. c. 9.* auncel weight (in which there was a deceit by guiding the balance with the hand) is taken away. *4 Inst. 273. Vide the st. 27 Ed. 3. st. 2. c. 10. 8 H. 6. 5.*

And therefore, there are only two species of weights allowed within the realm; *Troy*, and *Averdupois*. *4 Inst. 273.*

By *Troy* weight are weighed pearls, precious stones, gold, silver, bread, corn, &c. *Ibid.*

So, electuaries, spices, confections, by the *St. Comp. Pond.*

By the *st. 31 Ed. 1. Comp. Mens. 32* grains of wheat dry in the midst of the ear (or 24 grains of barley or artificial grains, *4 Inst. 273.*) make one pennyweight, of which 20 make an ounce, whereof twelve make a pound *Troy*.

So, 24 blanks make a droit, 24 droits a minute, 20 minutes a grain. *4 Inst. 273.*

So, 12 grains of fine gold make a caret, 24 carets make an ounce, 12 ounces make a pound of gold. *Ibid.*

[The jury of a leet have not power to enter houses to examine weights and measures; *Semb. Moor v. Wicker, M. 11 Geo. 2. Andr. 47.* tho' the usual practice is so to do.]

(L 7.) *Averdupois.*] *Averdupois*, tho' introduced by custom, is allowed by the *St. Comp. Pond. Vide Justices of Peace, (B 90.)*

So called because it gives full weight. *4 Inst. 273.*

*Troy* weight is 20 s. sterling to the pound, *Averdupois* is computed 25 s. sterling, or rather 24 s. 4 d. for it contains only 2 ounces 12 pennyweights *Troy* above a pound *Troy*. *Dalt. ch. 112. sect. 13.*

21 grains  $\frac{1}{10}$  make a pennyweight, 20 pennyweights make an ounce, 16 ounces make a pound *Averdupois*. *4 Inst. 273.*

7 pounds make a gallon, 14 make a peck, 56 a bushel. *Dalt. ch. 112. f. 14.*

By *Averdupois* are weighed all physical drugs, wax, pitch, tar, iron, steel, lead, hemp, flax, flesh, butter, cheese, and all commodities subject to waste. *4 Inst. 273.*

*What measures.*] *Vide Justices of Peace, (B 91, 92, 93.)*

*Wine licence.*] *Vide Justices of Peace, (B 100.)*

*Affise of wine.*] *Vide Justices of Peace, (B 98.)*

(L 8.) *Affisa panis et cervisia.*] By the *st. 18 Ed. 2.* it is declared that the leet may inquire of the affise of bread, or ale broken. *Vide Justices of Peace, (B 94. 96.)*

Or, of false measure in a bushel, gallon, yard, or ell. *Kit. 11. b.*

Or, of false balances, or weights. *Ibid.*

Or, of those who buy by a great and sell by a small measure. *Ibid.*

So, of those who, being tiplers, sell by measures not sealed. *Ibid.*

The affise of bread is broke, when bread is not made according to the size or quantity limited by some ordinance. *Vide Lit. f. 234.*

By the *st. 51 H. 3. Aff. Pan. & Cerv.* when wheat is 12 d. per quarter, wastel bread of a farthing shall weigh 6 l. 16 s. simnel bread less by 2 s. cocket bread more by 2 s. if of worse corn more by 5 s.

[Selling a loaf of bread as a quartern-loaf of 4 lb. 5 oz. and an half, whereas it wanted 4 oz. and an half, is not within the jurisdiction of the leet, for it is a new offence created by 3 *Geo. 3. c. 11.* which does not fix the price, and therefore is not an assise, and directs the prosecution to be before justices. *Colebroke v. Elliot, H. 6 Geo. 3. 3 B. M. 1859.*]

(L 9.) *Deceit in prices.*] By the *st. 23 Ed. 3. 6.* butchers, fishmongers, regrators, hostlers, brewers, bakers, poulterers, and all other sellers of victuals shall sell at reasonable prices, having regard to the price in places adjoining: and any convicted of selling in other manner shall pay double to the party damnified; or, in his default, to him that will sue for the same. *Vide Justices of Peace, (B 89. 95. 99.)*

And mayors, &c. of city, borough, &c. shall inquire of offenders, &c. or convict of neglect shall pay treble to the party damnified, and yet answer to the king.

By the *st. 25 H. 8. 2.* if cheese, butter, capons, &c. and other victual be enhanced, &c. the lord chancellor, treasurer, president, privy seal, steward, chamberlain, and other lords of the council, treasurer and comptroller of the household, chancellor of the dutchy of Lancaster, justices of B. R. and C. B. chancellor, chamberlains, under treasurer and barons of the *Exchequer*, or seven of them, (*quorum unus* chancellor, treasurer, president, or privy seal,) may set reasonable prices on the said victuals, and all persons having or keeping any such victuals to sell shall sell the same at such prices, on a penalty in the proclamation which notifies such prices.

But justice Berkley was impeached for saying that corn was victuals within the statute. 2 *Rush. 606.*

The leet may inquire of those who sell for unreasonable and excessive prices, having regard to the common prices in near places. *Kit. 11. b.*

As, of butchers, brewers, fishmongers, poulterers, cooks, vintners, and all others. *Ibid.*

Innkeepers who sell corn and beans at excessive prices, and take more than a halfpenny a bushel above the market price, and nothing for litter. *Kit. 11. 12.*

If an innkeeper do not bake his horse-bread according to the price of grain. *Kit. 12. a.*

If a miller take an excessive toll, which ought to be only the 20th or 24th grain according to the strength of the water. *Ibid.*

*Vide Justices of Peace, (B 89. 95. 99.)*

(L 10.) *In quality.* As to victuallers.] By the *st. 51 H. 3. of pilory and tumbrel*, a jury shall inquire if any butcher sell contagious flesh or that died of the murrain. *Vide Justices of Peace, (B 88.)*

Or, if cooks seeth unwholesome flesh or fish.

And therefore, as a nuisance, or as contained within the *St. Assisa Panis & Cervisia*, the leet may inquire if any sell bread or ale unwholesome. 4 *Inst. 262. Kit. 11. b.*

If

If a butcher, fishmonger, or other victualler sell corrupt victual. 4 *Inst.* 261. *Kit.* 11. b.

If corrupt malt or hops are used. 4 *Inst.* 263.

Or, corrupt drugs, or spices. *Semb.* 4 *Inst.* 264.

If a miller change grain, which he had to grind. *Kit.* 12. a.

If artificers use any deceit. *Ibid.*

Or, use two offices; of a tanner and shoemaker, or butcher, &c. *Fl.* 2. c. 52.

But the leet has not jurisdiction, if a tanner utter leather not sufficiently tanned. *R.* 1 *R.* 3. 1. a.

(L 11.) *In office.*] The leet may inquire of a constable, aleconner, bailiff, or other officer, who neglects his duty.

As, if a constable does not do watch and ward. *Fl.* 2. c. 52.

(L 12.) *Common nuisance. What shall be.*] So, a common nuisance may be inquired of at the leet. *Co. L.* 56. 1 *Rel.* 541. l. 45. *Kit.* 10. b. 23. a.

If it be *ad commune nocumentum* of all the king's liege subjects; for if the presentment does not say, *ad commune nocumentum*, it is bad. *R.* 2 *Cro.* 382.

Or, if it be, *ad nocumentum ligeorum prope inhabitantium.* *R.* 1 *Rel.* 406.

Or, *diversorum ligeorum.* *R.* *Cro. El.* 148.

As, if a ditch be made cross the highway. *Co. L.* 56. a.

Or, if a ditch in an highway be not cleansed. 1 *Rel.* 541. l. 50. *Kit.* 23.

And they may amerce for it in the leet; tho' a forfeiture for it is given to the surveyor by the *st.* 18 *El.* 10. *R.* *Ray.* 250.

So, if a gate be put up in an highway, tho' not locked; for it hinders the passage. *R.* *Cro. Car.* 184. 2 *Rel.* 137. l. 50.

If a laystall be made in an highway. *Kit.* 11. a.

Or, carrion thrown out there. *Ibid.*

If a way or path be stopped or diverted. *St.* 18 *Ed.* 2.

Or, there be an encroachment upon it. *Kit.* 11. a.

Or, billets or logs be laid *sparsim*, and continue there. *R.* 2 *Rel.* 137. l. 25. 35.

So, of a bridge broken. *Kit.* 23. a.

Or, water stopped, or diverted from its course. *St.* 18 *Ed.* 2.

Of bounds thrown down, or taken away. *Ibid.*

Of purpresture done in land, wood, or water, by the *st.* 18 *Ed.* 2.

Of blocks, stocks, ditches, or hedges levied, made, or filled up, to annoyance: by the *st.* 18 *Ed.* 2. *Kit.* 10. b.

Of walls, houses, pales, or hedges set up, or thrown down, to annoyance. *Ibid.*

If an house near the highway continues ruinous, to annoyance. *R.* 1 *Sal.* 357.

Tho' the occupier be only tenant at will. *Ibid.*

Of common breakers of hedges. *Kit.* 11. a.

Introducing inmates of poor families into an house. *R.* 2 *Rel.*

39. l. 5.

Corrupting water by whytawing, lime, or flax lying in the water. *Kit.* 11. b.



If a person who has no warren, stores his land with conies, it is a common nuisance. *Mo.* 453.

(L 13.) *Vide* Action, *what not*, upon the Case for a Nuisance.] But if any (besides the parson or lord) build a dovecote, it will not be a nuisance inquirable by the leet; for if it be lawful for the lord or parson, it cannot be a nuisance in another. *R.* 2 *Cro.* 382. 491. 2 *Rol.* 138. l. 36.—*Cont.* *Mo.* 238. 5 *Co.* 104. *Mo.* 421. *Acc.* 2 *Rol.* 4. 30.

So, if a man unload billets, &c. in a street or highway; for necessity requires it. 2 *Rol.* 137. l. 30. 2 *Rol.* 32.

Or, erect scaffolds, &c. for repairing a building. 2 *Rol.* 145. l. 10.

So, a private nuisance is not inquirable in the leet: as, if one surcharge a common. *R.* 1 *Rol.* 541. l. 40.

If he stop a watering place for the inhabitants of B. *Co. L.* 56. a.

If he stop up his lights. *R.* 9 *Co.* 58. a.

If he suffer his gate to be open to the annoyance of others. *R.* *Cro. El.* 414. *Mo.* 356.

*Vide* Action upon the Case for a Nuisance.

(L 14.) *Jurisdiction by several statutes.*] Also, by the words of several statutes, the leet may inquire of the following offences:

As, by the *st.* 14 (or 14 and 15) *H.* 8. 10. of those who trace hares in the snow, who shall forfeit 6s. 8d. to the lord of the leet. *Vide Justices of Peace*, (B 9.)

By the *st.* 24 *H.* 8. 10. every occupier of land within a leet, presented for not endeavouring to destroy choughs, crows, and rooks upon his land, shall be amerced at the discretion of the steward, and two presenters (named by the others) according to the offence, to the use of the lord, to be levied by distress as other amerciaments. And the steward ought to give this act in charge.

*Nota*; This part of the act was repealed by the *st.* 8 *El.* 15. and the repeal continued by several other acts which are all expired, whereby this clause seems now in force.

By the *st.* 32 *H.* 8. 13. if any put a stone-horse above two years old, and not fifteen hands high, on a common wast, &c. within the shires and territories of *Norfolk*, *Suffolk*, *Cambridge*, &c. or not being fourteen hands, on like grounds in any other shire, it shall be forfeited to the finder, who may carry a constable to fetch the horse to pound, and measure him before three honest men. And the constable or three men refusing, &c. forfeit 40s. And owners shall yearly in fifteen days after *Michaelmas* drive the forests, commons, &c. on pain of 40s. which offences may be presented in the leet, and such presentment shall be certified to the next general sessions of the county in forty days, on pain of 40s. by the steward.

By the same *st.* if any put any scabbed horse on a common, &c. he forfeits 10s. to the lord; of which the leet may inquire. *Vide Justices of Peace*, (B 43.)

By the *st.* 33 *H.* 8. 6. none shall keep or use an hand-gun not a yard long in the stock and barrel, or hag-but not three quarters of a yard long, on pain of 10l.

None, not having 100*l.* *per annum*, shall shoot with, keep or carry bent or charged any cross bow, hand-gun, or hag-but, unless

less to shoot at a butt or bank of earth in a place convenient, on pain of 10*l*.

None shall shoot within a quarter of a mile of city, borough, or market, unless at a butt or bank.

No servant shall shoot at a deer or fowl by command of his master, but may carry a gun for his master, or to be mended, on pain of 10*l*, a moiety to the king, half the other moiety to the lord of the leet, and half to the informer.

By the *st*. 33 *H. 8.* 9. every one, for every male in his house, of or above seven and under seventeen years of age, shall provide a bow and two arrows: and every one, above seventeen and under sixty, shall provide himself a bow and four arrows, on pain of 6*s.* 8*d.* for each offence, except a spiritual person, or judge.

None under twenty-four shall shoot, unless at rovers, on pain of 4*d.* every shoot, and none above shall shoot at a mark of 220 yards or under, with any prick-shaft on pain of 6*s.* 8*d.* None under seventeen shall use a yew bow, who or whose parents have not lands or tenements to the value of 10*l.* *per annum*, or be not worth 40 marks in goods, on pain of 6*s.* 8*d.* Every town shall provide butts on pain of 20*s.* for every three months' default.

By the *same st.* none shall keep a common house, or alley, for bowls, coys, tennis, dice, cards, or other unlawful game, invented or to be invented, on pain of 40*s.* for every day, without a placard [all such placards made void by *st.* 2 & 3 *Ph. & M.* 9.] expressing what game, and by whom to be played, at the obtaining of which he shall find surety not to use it contrary to the form thereof. *Vide Justices of Peace*, (B 42.)

None shall haunt, or play at, such houses, or games, on pain of 6*s.* 8*d.* for every time.

And no artificer, handicraftsman, husbandman, labourer, apprentice, journeyman, mariner, fisherman, waterman, or servant, shall play at any unlawful game, unless at *Christmas* in the master's house, or by licence of the master, with such as resort to his house, on pain of 20*s.* every time. A moiety of the forfeitures to the lord of the leet, a moiety to the informer. And justices, bailiffs, constables, &c. shall search once a month at least, on pain of 40*s.* if need be, after such houses, and games, and the keepers, or haunters of them may imprison, till they find surety by recognizance not to keep or haunt such games.

By the *st.* 33 *H. 8.* 17. none shall water hemp or flax in a river, stream, or common pond, where cattle drink, on pain of 20*s.* in a court of record, leet, &c. a moiety to the king, a moiety to the informer.

By the *st.* 2 & 3 *Ed. 6.* 15. butchers, brewers, bakers, poulterers, cooks, or fruiterers, conspiring not to sell but at certain prices: and artificers, or labourers, conspiring not to work but at certain prices, or at certain hours, or times, or not to finish what others have begun, forfeit 10*l.* for the first offence, or on non-payment in six days, twenty days' imprisonment: 20*l.* for the second, or on non-payment in six days, pillory: 40*l.* for the third, or on non-payment in six days, pillory and one year. *Vide Justices of Peace*, (B 89.)

By the *st.* 7 *Ed. 6.* 5. none shall retail wine but in a city, borough, port, corporate, or market-town, on pain of 10*l.* *per diem*. Nor, in a city,

a city, or town corporate, unless empowered by the head officer and most part of the common council, aldermen, burgessees, or commonalty there, by writing under the common seal, on pain of 5 *l.*—But now, by the *st.* 12 *Car.* 2. 25. the patentees of granting wine licences may empower, &c. as it seems. *Vide Justices of Peace*, (B 100.)

By the *st.* 2 & 3 *Ph. & M.* 8. the steward of a leet may fine, or amerce, at his discretion, offences presented to be committed within the leet against that statute for repair of the highway; and in their default, the quarter-sessions.

And by the *st.* 18 *El.* 10. the leet has jurisdiction of offences against that act for the repair of the highways.

By the *st.* 1 *El.* 17. the leet may inquire within a year, of those who take the fry, or spawn of fishes, or pikes under ten, salmon sixteen, trouts eight, barbel twelve inches, or take fish (except by angling) in another way than with a net or tramell of two inches and half mesh, except smelts, loches, minnies, gudgeons, and eels, who shall lose 20 *s.* to the lord of the leet. And if the steward does not give this in charge, he shall lose 40 *s.* And if the jury voluntarily conceal the offence and do not present it, the steward shall impanel another jury to inquire of the concealment, and if it be found, each juror shall lose 20 *s.* to the lord of the leet. *Vide Justices of Peace*, (B 44.)

[The water-bailiff cannot seize unlawful nets before conviction. *Bulbrook v. Goodere*, *M.* 6 *Geo.* 3. 3 *B. M.* 1769.]

By the *st.* 23 *El.* 10. the leet shall inquire, if any in the night take a pheasant, or partridge, or hawk, or hunt with a spaniel, over eared corn, who shall forfeit 20 *s.* for each pheasant, 10 *s.* for a partridge, 40 *s.* for hunting, or hawking, a moiety to the lord, a moiety to the informer, or, if he refuse it, to poor men of the parish, and shall find surety before a justice of peace not to offend within two years; and if he does not pay within ten days, he shall be imprisoned for a month, without bail. *Vide Justices of Peace*, (B 45, 46.)

By the *st.* 31 *El.* 7. the leet shall inquire if any erect a cottage for habitation, without four acres of land, his freehold or inheritance, annexed to it, who shall forfeit to the king 10 *l.* or continuing such cottage shall forfeit 40 *s.* *per mensem*, unless it be within a borough, or town, or within a mile of a mine, quarry, &c. for working there, or within a mile of the sea or navigable river for a sailer, or such who by occupation makes, furnishes, or victuals any ship, or cottage by a parker, or warrener, or before erected by a common herdsman, shepherd, or impotent poor, or by order of assises or quarter-sessions: or, if any place, or suffer an inmate or more families than one in any cottage, who shall forfeit 10 *s.* *per month* to the lord of the leet, to be levied, after presentment, by distress, or recovered by action of debt. *Vide Justices of Peace*, (B 84, 85.)

### (M) Officers in a Leet.

#### (M 1.) Steward.

*Provideat sibi dominus de seneschallo discreto, &c. cujus officium est curias tenere, &c. Fleta*, l. 2. c. 72. *Vide Copyhold*, (C 5.—R 3. 5, &c.)

In a court leet the steward is judge. 6 *Co.* 12. 4 *Inst.* 261.

And he is a judge of record. 10 *H.* 6, 7. a. *Kit.* 41. *R.* 8 *Co.* 41. *Griesley*. The



The steward of a leet may be retained by deed, or by *parol*. *Co. L. 61. b. R. 4 Co. 30. a. Dy. 248. Kel. 158. b.*

And shall have debt for his salary, but not annuity, tho' retained without deed. *Dy. 248.*

He may make a precept to the bailiff to distrain, by *parol*. *Kit. 41. a.*

And may fine. *Kit. 41. R. 8 Co. 41.*

A steward might have been punished in the star-chamber for a misdemeanour. *Kit. 42. a.*

(M 2.) Bailiff.

*Ballivus cujuscumque manerii debet esse in verbo verax. in opere diligens &c. Fl. l. 2. c. 73.*

And shall be sworn in the leet to do his office. *Kit. 45, 46.*

(M 3.) Reeve.

The reeve is called from the Saxon word *gerefa, prapostus*. *Co. L. 61. b.*

*Domino vel seneschallo debet presentari, cui injungatur officium, &c. Fl. l. 2. c. 76.*

And shall be sworn to do his office in the leet. *Kit. 46. a.*

And his oath contains, that he will execute all attachments and process to him directed by the lord, or his steward, and present all pound-breaches, waifs, and estrays, &c. *Kit. 46. a. Co. L. 234. b.*

(M 4.) Ale-conner.

An ale-conner shall be sworn in the leet, to see that bread be weighed according to the assise, and that ale be wholesome, and sold at due prices, and to present all defaults of brewers and bakers. *Kit. 46. b. [Vide 1 Wilf. 248.]*

(M 5.) Constable.

(M 5.) Chief constable.] A constable is an officer chosen for the maintenance of the king's peace within his precinct.

And by the common law, there was a chief constable as well as a petit constable. *1 Sal. 175. 381. [Vide 2 Ld. Raym. 1192.]*

By the *st. Wint. 13 Ed. 1. st. 2. c. 6.* in every hundred and franchise, two constables shall be chosen to make the view of armour, [repealed as to armour, by *21 Jac. 28.*] who shall present to the justices such defaults as they see about armour, suits of towns, highways, lodging strangers in upland towns for whom they will not answer, and defaults in not following hue and cry. (*Vide 4 Inst. 267.*)

And therefore, their duty by that statute consists in those five points. *Ibid.*

But their authority was only enlarged by that statute. *1 Sal. 381. Cont. 4 Inst. 267.* where it is said, that they have no authority but what was given by that or subsequent statutes.

[The mutiny acts, under the word *constable*, comprehend a high-constable. *Medhurst v. Waite, M. 2 Geo. 3. 3 B. M. 1259.*]

He may make a deputy to do ministerial acts, and such is billeting soldiers; for not every act which requires judgment is a judicial act, but such as is done *pendente lite*, of some sort or other. *Ibid.*

The high constable shall, regularly, be chosen by the justices of peace at sessions. *1 Bul. 174.* Or,

Or, by prescription, he may be chosen by the leet, as well as the petit constable.

So, the sessions may remove, if necessary. 1 *Bul.* 174. *Sal.* 150.

So, if such constable present another at the end of his year according to usage, and the court refuse him, *B. R.* may issue a *mandamus* for his discharge, and the swearing of the other; and if there be a cause for the refusal it must be returned. *R.* 1 *Rol.* 536. l. 5.

And if, during his office, he be elected overseer in another parish, he shall be discharged by *B. R.* 2 *Jon.* 46.

(M 6.) *Petit constable. How chosen.*] The petit constable is an officer at common law. 4 *Inst.* 265. 267.

And his election belongs to the leet. 4 *Inst.* 265. *R.* 1 *Rol.* 541. l. 25. *Sal.* 502. *Sav.* 94.

And properly to the homage there. 2 *Jon.* 212. 1 *Sal.* 175.

And the leet may prescribe to elect one of the residents constable. 8 *Co.* 38. a.

[But a prescription must be laid for choosing a constable in a particular manner. 1 *Ld. Raym.* 94.]

If the constable elected be present, he shall be sworn there. 1 *Sal.* 175.

So, a corporation may prescribe to choose a constable, but has no right to do it of common right. *R.* *Sal.* 502. *Comb.* 416.

And an indictment for refusing to be sworn when chosen by a corporation, must shew the power to elect by custom, or prescription. *Semb.* *Skin.* 669. *Comb.* 416.

[The quarter-sessions cannot discharge constables appointed at the leet. *Constables of Limington's Case*, P. 1 *Geo.* 2. *Str.* 798.]

And therefore, if a constable chosen by the leet be discharged at the sessions, and another sworn, a writ shall issue out of *B. R.* to the justices to discharge the party chosen by them, and to swear him chosen in the leet. *R.* 1 *Rol.* 535. l. 45. 541. l. 15. 1 *Bul.* 174.

[Not a writ but a rule of court.]

But a borsholder, headborough, or borough-head, tythingman, trithingman, or the chief pledge, has the same authority in many cases as the petit constable.

And by the *st.* 13 & 14 *Car.* 2. 12. in case the constable, &c. dies or goes out of the parish, two justices of the peace may make and swear a new constable, tythingman, &c. till the lord holds a leet, or the next quarter sessions, who shall approve the officer so made and sworn, or appoint another, as they think fit.

[If the sessions discharge old constables, and appoint new ones, on a suggestion that the old ones had served a year, they must make an adjudication of their having served the year. *Rex v. Davis*, T. 9 *Geo.* 2. *Str.* 1050. *B. R. H.* 282.]

[The sessions cannot appoint constables for a year, or till others are chosen, but only till the lord holds a court. *Ibid.*]

So, a constable chosen at the leet may be sworn by the sessions, or any justice of peace. 1 *Mod.* 13. 2 *Jon.* 212.

So, if the homage choose a constable, but the steward refuses him, and swears another, the quarter-sessions may examine the matter, and swear him who was chosen by the homage. *R.* 2 *Jon.* 212.

So, if a constable chosen at the leet be absent, the justices of peace

as conservators of the peace By the common law, may swear him  
1 *Sal.* 175. *Skin.* 635.

And the constable ought to have notice of his election. *Skin.* 635.

Yet the sessions since the *st.* 13 & 14 *Car.* 2. cannot make a constable where there never was any. *Semb.* 1 *Mod.* 13.

Yet it was said *per Holt*, that a constable and a vill are correlative, and the justices of peace may make them in any vill, but not in an hamlet. 1 *Sal.* 176.

So, the sessions cannot imprison for refusing to be sworn, but he must be indicted. *R. Cro. Car.* 567.

(M 7.) *Who shall be a constable.* He may make a deputy.] The constable elected ought to be *homo idoneus*: viz. honest, and of competent knowledge, substance, and ability of body. 8 *Co.* 41. b. *Vide Officer*, (D 1.)

If he be *idoneus*, he may be chosen, tho' he be a master of arts. *Semb.* 1 *Rol.* 533. l. 45. 541. l. 15.

Tho' he be tenant to a parliament-man. 1 *Mod.* 13.

Or, a physician. *R.* 1 *Mod.* 22. *Dub.* 1 *Sid.* 431.—*S. C.* 2 *Keb.* 578.

Tho' he be a watchman at the custom-house, and allege a custom that such shall not be; for the custom is void. *R.* 1 *Sid.* 272.

Or, a captain of the king's guard. *R.* 1 *Lev.* 233.

But an alderman of *London* shall not be chosen constable, where he lives in the country; tho' by the custom the constable is to be chosen of any of the inhabitants within the manor. *R. Cro. Car.* 585. *Jon.* 462. [*Doug.* 538.]

Nor, an attorney; but he shall have a writ of privilege. *R. Cro. Car.* 389. *D. Cro. Car.* 585. [*Doug.* 538.]

Nor, the servant of a member of parliament. 1 *Mod.* 13.

Nor, a counsellor or barrister at law. 2 *Keb.* 578.

Nor, by the *st.* 1 *W. & M.* 18. a teacher in a congregation allowed by the same act.

Nor, by the *st.* 6 (or 6 & 7) *W.* 3. 4. an apothecary in *London* or seven miles distance, if free and approved by the company, or in the country, if he hath been seven years apprentice, while he continues to use the trade.

Nor, by charter 2 *Jac.* a surgeon. 2 *Keb.* 578.

[A man is not exempted from being constable of a manor, which exceeds the bounds of one parish, by a certificate under 10 & 11 *W.* 3. c. 23. for this is not a parish or ward office, tho' he may be exempted from being constable of a parish, or of a manor co-extensive with a parish. *Rex v. Derbyshire*, T. 1 *Geo.* 3. 2 *B. M.* 1182.]

[One who is *resant* within a private leet within a hundred, is not therefore exempt from serving the office of constable within the hundred. And a custom to elect such a one constable is good. *Cowp.* 13.]

[A younger brother of the *Trinity-House* is not exempt from serving the office of headborough by any of the charters granted to that corporation. 1 *T. R.* 679.]

So, if the constable be not *idoneus*, he may be discharged by the leet, or a writ out of *B. R.* 8 *Co.* 42. a. 1 *Bul.* 174. [By rule of court.]

So, if a constable be chosen for a year, and at the end of the year he



he presents another to the leet to be sworn, and the steward will not swear him, a writ shall issue out of *B. R.* to the steward to swear him; and if he be not *idoneus*, it may be returned for cause. *R. 1 Rol. 536. l. 5.*

So, if a tythingman by the custom ought to serve only for one year, and the homage continues him for another year, there may be a writ from *B. R.* for his discharge, and to elect another. *R. 1 Rol. 536. l. 10.*

And by the *st. 13 & 14 Car. 2. 12.* if a constable continue above a year in his office, the justices at the quarter-sessions may discharge him, and place another fit person in his room, till the lord hold his court.

(M 8.) *The duty of a constable. To take an oath.*] A constable, elected, must take an oath, if it be required, to execute his office.

And such oath may be administered by the steward of the leet. *Kit. 47. a. 1 Sal. 175.*

Or, by any justice of peace, 2 *Jon. 212.*—as conservator of the peace, *1 Sal. 175. Vide ante, (M 6.)*

Or, if he be chosen by two justices, or the quarter-sessions, pursuant to the *st. 13 & 14 Car. 2. 12.* by the justices or sessions.

[If a constable chosen at the leet is afterwards sworn-in before a single justice of the peace, it is a good swearing. *Rex v. Franchard, H. 14 Geo. 2. Str. 1149.*]

And if the constable refuse the oath, being present, the steward may fine him for his contempt. *R. 8 Co. 38. 41. 1 Sal. 175. 5 Mod. 96. 130. Sav. 94. [1 Ld. Raym. 70.]*

If he be absent, he may be presented by the homage at the next court, and amerced. *1 Sal. 175. 5 Mod. 130.*

So, he may be indicted for refusal. *5 Mod. 96. Dub. F. g. 192. Vide post. (M 11.)*

But the indictment must shew he was well elected and by whom. *R. 5 Mod. 96.*

So, the sessions cannot fine him for refusing to be sworn. *5 Mod. 96.*

(M 9.) *To keep the peace.*] A constable by his oath swears that the peace shall be duly kept according to his power. *Kit. 47. a.*

That he will arrest all whom he sees making riots, debates, or affrays. *Ibid.*

That he will endeavour, upon complaint, to take felons, barretors, and riotous persons. *Ibid.*

And that the statutes against beggars, vagrants, rogues, and idle persons shall be observed. *Ibid.*

A constable by the common law is a conservator of the peace within his precinct. *Kit. 47. b.*

And therefore, if the peace be broke in his view, he may take the wrong-doers and bring them to a justice of peace. *H. P. C. 135.*

So, if it be in the night, &c. he may imprison them in the stocks, or other custody for a reasonable time, till he can bring them before a justice.

Or, till they find surety. *H. 136. Per Poph. 13.*

So, he may make proclamation, that the affrayers depart.

And if an affrayer flies, he may pursue him into another county or franchise. *H. 92.*

If he flies to an house, he may break open the house to take him. *H. 136.*

Or, if the affray be made in an house. *H. 135.*

If an assault be upon the constable himself, he may take him, or return the blow. *H. 92. 136.*

So, upon complaint of a felony committed, he may take up any of bad fame, suspected. *17 Ed. 4. 5. H. 92. Vide Imprisonment, (H 4.)*

He may arrest him that gives the stroke, tho' the party be not dead. *H. 92.*

So, upon complaint, he may take him that threatens death. See *Lamb. Const. sect. 13. at the end.*

And upon a felony he may break open an house to take a man. *H. 93.*

So, he may arrest for prevention of a felony. *H. 136. Brownl. 198. Popb. 13.*

So, he may arrest night-walkers, who go abroad in the night and sleep in the day. *R. 13 H. 7. 10. b.*

And persons who frequent houses of bawdry, or keep suspicious company. *Ibid.*

Or, by the custom of *London*, he may carry to the counter a person found with a woman in adultery; for it is a breach of the peace. *H. 7. 6.*

So, he may detain in the stocks him who leaves an infant of two months old in a church. *R. Mo. 284. Cro. El. 287. Popb. 12.*

So, by his office, he may bring before a justice of peace a person whom he finds drunk, tippling, cursing, &c. contrary to the statute.

Or, selling wares, using unlawful sports, or travelling upon a Sunday contrary to statute.

But a constable cannot imprison, or put in the stocks, without bringing the person before a justice of peace. *R. Sav. 98.*

Nor, for longer time than till he can conveniently bring him before a justice. *H. 92.*

So, he cannot imprison, without a warrant, for an affray not made in his view. *H. 136. [Vide 2 Ld. Raym. 1301.]*

Nor, for an assault, or contumelious language to him, going upon his duty. *R. Sav. 98.*

So, he cannot take a recognizance for the peace. *Kit. 48. b. Dalt. 3.*

Nor, an obligation for security of the peace. *Cont. Kit. 48. a. b.*

(M 1c.) *To execute process. Pursue without cry.—Present affrays, &c. —Provide watch and hue and cry.* So, a constable swears to execute all process or precepts to him by the justices of peace. *Kit. 47.*

If a statute gives jurisdiction to justices of peace, the constable, tho' not named by the statute, must execute all process and warrants of the justices thereupon to him directed. *R. 1 Sal. 381.*

If the warrant be to him only he may execute it out of the precinct of his vill, tho he need not do it. *1 Sal. 176.*

Otherwise, if a warrant be directed generally, to all constables, bailiffs, &c. for then the constable cannot go out of his precinct. *1 Sal. 176.*

[Unless

EVER  
the  
11 Co. 44

[Unless in *London*. 2 *Ld. Raym.* 1299.]

So, if a constable sees an affray, and would arrest the affrayers, who fly into another county, he may pursue and take them there. 13 *Ed.* 4. 8. b.

After a warrant executed, the constable ought to certify what he has done; otherwise the defendant cannot be discharged. *R.* 1 *Sal.* 381.

But he need not return the warrant; for it may be necessary for his defence. 1 *Sal.* 381.

If any make resistance with force, &c. he is sworn to make outcry, and pursue them till taken. *Lamb. Const. sect.* 14.

And if any upon a felony fly, the constable may seize and safely keep his goods, for which he must answer, and therefore ought to inventory them.

He is also sworn, that he will present bloodsheds, outcries, affrays and rescues within his office. *Kit.* 47. *Dalt. ch.* 174. at the end.

But he is not obliged to make presentment but of an offence within his constable, tho' it be proved to him by witnesses. 1 *Vent.* 336.

He is also sworn, that he will endeavour that the *st. Winton* for watch, and hue and cry, be observed. *Kit.* 47.

A constable is charged to see that the watch be observed according to the *st. Winton*, 13 *Ed.* 1. 4. *Lamb. Const. sect.* 13.

And that hue and cry be pursued from town to town against felons, according to the *st.* 13 *Ed.* 1. 1. *Lamb. Const. sect.* 13. for he ought to raise the town by night or day, and warn the next constable. *H. P. C.* 90.

He shall bring suspicious persons, delivered to him by the watch, before a justice. *Dalt. ch.* 104. *sect.* 3.

If an inhabitant in his turn refuse to watch, the constable may put him in the stocks. *R.* 3 *Leo.* 208. *Per Wray, Gawdy cont. Cro.* *El.* 204.

So, he may be indicted for the refusal. *Comb.* 243.

But the constable cannot make a passenger to serve upon the watch, but must aver that he was an inhabitant. *R.* 3 *Leo.* 208. *R. Cro. El.* 204.

Nor, an inhabitant of a town at his pleasure, but in his turn. 3 *Leo.* 208.

So, an indictment against a woman for not watching is bad, unless it says that she did not procure another to watch for her. *Comb.* 243.

(M 11.) *Penalty for neglect.*] If a constable neglects his duty, he may be indicted: as, if he does not execute a warrant, or process to him directed. 2 *Rol.* 78. *R.* 1 *Sal.* 381. 5 *Mod.* 96. *Vide ante,* (M 8.)

### (N) Fine in a Leet.

(N 1.) When a Fine may be imposed:

EVERY court may impose a fine for a contempt within view of the court: as, all the courts of record in *Westminster-Hall*. 11 *Co.* 44. a.



So, the leet may impose a fine, pursuant to a bye-law there, for harbouring of inmates. *Per Hale, Hard. 471.*

So, for an offence within the view of the steward. *2 Rol. 3. 4.*

So, the court of admiralty may impose a fine for contempt in their view, tho' it be not a court of record. *1 Vent. 1.*

So, the court of mayor and alderman in *London*, if an alderman refuses to attend the court. *Semb. Pal. 533. 539.*

But, generally, a court, not of record, cannot impose a fine: as, a county court, hundred, or court-baron. *11 Co. 43. b.*

So, a court, in equity by *English* bill, cannot fine for not answering the bill.

Nor, for not performing a decree. *4 Inst. 84.*

So, ecclesiastical courts before the ordinary, archdeacon, &c. or their commissaries; for they proceed according to the canon or civil law. *11 Co. 44. a. 4 Inst. 324.*

Nor, the high commission. *4 Inst. 324, &c.*

So, a constable, tho' he may imprison upon an affray, cannot fine. *11 Co. 44. a.*

So, the pope never fined or imprisoned, but proceeded only by ecclesiastical censures. *4 Inst. 324.*

So, no ordinary or ecclesiastical judge in an ecclesiastical cause, unless authorized by act of parliament. *Ibid.*

Tho' the king by letters patent grants a power to fine. *Ibid.*

(N 2.) *Proclamation upon pain.*] So, where a court may fine, it may make proclamation, upon pain: as, proclamation for silence, upon pain. *1 Rol. 219. l. 12.*

Or, command that an officer shall do his duty, upon pain, and if he do not he shall lose his office. *1 Rol. 219. l. 15. Per Cotsmore, 7 H. 6. 12. b.*

### (N 3.) For what Cause.

A fine may be imposed for any neglect of his duty to the court by any officer: as, if an officer in a leet refuse to do upon command that which belongs to his office. *8 Co. 38. b. 1 Rol. 218. l. 40. 542. l. 12.*

If a bailiff refuse to make a return of the pannel. *1 Rol. 219. l. 15. 542. l. 12.*

If a constable, being elected, refuse the office. *R. 8 Co. 38. 41.*

Or, to make a presentment. *8 Co. 38. b.*

So, if a juror refuse to be sworn he may be fined. *1 Rol. 219. l. 18.*

Or, if he depart without giving his verdict. *8 Co. 38. b.*

Or, the inquest refuse to present defaults of which they are informed. *Kit. 41. b.*

Or, a man refuse to be sworn to give evidence to the grand inquest, in a case of high-treason. *1 Sal. 278.*

Or, the jury, being sworn to present articles of the leet, refuse to do it, each may be fined for such concealment and contempt. *R. Dy. 211. b.*

So, for a contempt in view of the court: as, if a man makes a disturbance in court. *R. 8 Co. 38. b.*

If the steward desire him to be uncovered, and he says, that he does not regard what he can do. *R. Ray. 68.*

If he says openly to the steward in court, *you lie*; for it is a contempt. *R. Mo. 470. Cro. El. 581.*

If a man refuse to be sworn to give a verdict, or will not give a verdict when sworn. *Semb. 1 Leo. 217.*

But for a thing not in his view, the steward cannot fine: as, for not doing suit. *R. Cro. El. 241.*

Nor, for words which do not import a contempt: as, if he say to the steward in the town-hall, *that the mayor has more right there than the steward himself.* *R. 2 Jon. 229.*

#### (N 4.) In what Manner.

[N 4.] *Must be assessed severally.*] A fine ought to be imposed upon every offender severally. *Dy. 211. b.*

Tho' many join in the same offence; for the offence of one is not the offence of the others: as, if the twelve chief pledges refuse to present *pro certo leta*, they cannot be fined together. *R. 11 Co. 42. b.*

But where there is an uncertainty, as to the offenders, they may be fined generally together: as, a fine may be imposed upon the whole town, hundred, or county, &c.: as, for the escape of a murderer. *11 Co. 43. b.*

[N 5.] *Must be reasonable.*] So, a fine ought to be reasonable. *4 Inst. 261.*

By the *st. 1 W. & M. 2. sess. 2.* excessive fines ought not to be imposed.

And therefore, if a fine in a court leet be unreasonable, it may be avoided by plea, and judgment of the court; for the judges are to determine the reasonableness of the fine. *R. 11 Co. 44.*

So, if a fine be excessive, or without cause, it shall be discharged upon a *certiorari* to remove it to *B. R.* *1 Vent. 336.*

So, upon a distress for such a fine, trespass lies. *R. 2 Jon. 229.*

So, upon a *certiorari*, &c. the cause of the fine, the words, or contempt for which it was imposed, ought to be shewn in particular. *R. 1 Vent. 336.*

If 6*l.* be assessed for a fine for not presenting a *certum leta*, it will be excessive. *Semb. 11 Co. 44.*

But a fine of 40*s.* for a contempt in court is not excessive. *Ray. 68.*

Nor, 5*l.* for refusing to be constable. *8 Co. 38.*

Nor, 40*l.* for refusing to impanel a jury. *Kit. 41. b.*

How a fine shall be collected and answered to the king, *vide in Prærogative, (D 51, &c.)*

#### (O) Amerciament.

(O 1.) When it may be imposed. In a Leet.

SO, for an offence in the leet, not done in the presence of the steward, or in contempt of the court, a man may be amerced.

[When an offence is presented by the jury, the punishment is by

amerciament, not fine, tho' it be a contempt *Moore v. Wicker, M. 11 Geo. 2. Andr. 47. Vide 1 Wils. 248. et seq.*

As, for not doing suit. *Cro. El. 241. Mo. 89. Kit. 43. a.*

Or, not paying *certum leia.* 13 *H. 4. 9.*

For a nuisance done. *Kit. 43. a.*

But there shall not be an amerciament in the leet for a trespass done to the lord himself; for he shall not be judge in his own cause. 1 *Rol. 211. l. 25. 12 H. 4. 8. b.* [*Wood v. Lovatt, B. R. H. 36 G. 3. 6 T. R. 511.*]

Nor, for non-payment of a rent to him, for which he may distrain. 1 *Rol. 211. l. 10.*

Nor, for a neglect in keeping a tumbrel, or stocks; for the lord of the leet ought to do it. *R. Mo. 573. Cro. El. 698.*

Nor, for leaving his gates open to the nuisance of the inhabitants; for it does not appear to the leet. *R. Mo. 356.*

Nor, for digging coney-burrows in the lord's waste. *R. Ray. 160.*

Nor, for encroaching upon the waste, and building a cottage there. *R. 1 Sand. 135.*

Nor, for any private nuisance, or thing, to the damage of the lord or any other. 1 *Sand. 135.*

#### (O 2.) How assessed.

An amerciament ought to be imposed with mercy; and therefore it is called *misericordia.* *Co. L. 126. b. 8 Co. 41. F. N. B. 75. E. H.*

By the *st. M. Ch. 9 H. 3. 14. nullus liber homo amercietur nisi secundum modum delicti, salvo contenemento, mercator salva merchandiza, villanus salvo wainagio, ecclesiastica persona secundum laicum tenementum, &c.*

And therefore, shall be proportioned according to the offence to the lord, and not the damage to the tenant. *F. N. B. 75. E.*

The arms of a soldier are his contenement, and the books of a scholar, &c. 2 *Inst. 28.*

But the amerciament of a duke shall be 10*l.*, of an earl or bishop 5*l.* *Ibid.*

And if he be amerced as a baron, when he does not hold by barony, it may be pleaded in discharge. *Mad. 367.*

By the *st. M. Ch. 14. misericordia non ponatur, nisi per sacramenta proborum & legalium hominum de vicineto.*

And therefore, when it is fixed by the court, it must be assessed and moderated by others. *F. N. B. 75. G. R. 1 Rol. 542. l. 20. Hob. 129. R. 3 Lev. 206.*

In a court-baron, by the tenants of the same court upon oath. *F. N. B. 76. D.*

If it be assessed without assessment, the party shall have a writ upon *M. Ch. 14.* and thereon an *alias, pluries,* and attachment. *Ibid.*

Or, if it be outrageous, a writ *de moderata misericordia.* *F. N. B. 75. A. Noy, 20.*

And it ought to be assessed at a sum certain. *R. 1 Rol. 542. l. 20.*

Or, reduced to a certainty by assessment. 3 *Mod. 138.*

And assessed upon each severally. *F. N. B. 75. G.*

[A general



[A general amerciamment is good, if it is afterwards reduced to a certainty by afferment. *Moore v. Wicker, M. 11 Geo. 2. Andr. 47.*]

Or, by custom, it may be a sum certain, without afferment. *Semb. 2 Mod. Ca. 299.*

But an afferment by the steward is void. *8 Co. 41.*

Or, by four of the jury. *D. Cro. Car. 275.*

Or, by the whole jury; for it ought to be afferred by officers chosen by the steward, and sworn for that purpose. *3 Lev. 206.* But now it may be afferred by the jury. *Semb. Sho. 62.*

[Amerciamment of a freeholder must be afferred by freeholders of the manor. *Baldwin v. Tudge, H. 28 Geo. 2. 2 Wils. 20.*]

Yet, if the jury assess the amerciamment, it is sufficient, without other afferment. *8 Co. 40. b. Semb. cont. Jon. 301.*

If an issue be, whether *A.* and *B.* were afferors, it shall be tried by the record, not by the country. *Cro. El. 860.*

By the equity of the *st. W. 1. 3 Ed. 1. 18.* the clerk of the warrants estreats the amerciamentments in *C. B.* and delivers them to the clerk of assise to be afferred by the coroners, and they are afterwards re-delivered to the clerk of the warrants, who with the justices of *C. B.* delivers the roll to the *Exchequer.*

So, the amerciamment in *B. R.* or before justices of assise. *F. N. B. 76.*

If the plaintiff be nonsuited, when a verdict is ready to be delivered, the amerciamment shall be assessed by the jury. *R. 8 Co. 39. b.*

An amerciamment upon a sheriff, gaoler, or other minister of justice, shall be assessed by the justices of the court, and the entry shall be, *ideo in misericordia et offeratur per just.* for it is out of *M. Ch.* or the *st. W. 1. 18. 8 Co. 40.*

### (O 3.) When upon a Town, County, &c.

So, a town, hundred, or county, may be amerced for murder or manslaughter committed there. *Mad. 374. 377.*

So, for other misdemeanors. *Mad. 378.*

As, for not making hue and cry. *Mad. 386.*

Permitting the escape of a felon. *Mad. 387. Adm. 1 Leo. 107. 3 Leo. 207.*

Concealment of homicide. *Mad. 389.*

But if a felony be done in the night time, and the felon escape, a town in the county shall not be amerced for it. (*Vide 1 Leo. 107. 3 Leo. 207.*)

So, if a felon give a mortal wound in the day time of which the party dies in the night; for till death it is no felony. *Semb. 3 Leo. 207.*

But the king's demesnes were discharged of so much of the amerciamment as was charged upon them. *Mad. 374.*

So, lands in the possession of the queen. *Ibid.*

So, the barons of the *Exchequer*, for themselves and their tenants. *Mad. 375.*

And ecclesiastical persons, for an ecclesiastical fee. *Ibid.*

So, the lands of him who has the king's grant for his discharge. *Mad. 374.*

So, an amerciamment must be reasonable, otherwise the lord shall not have an action for it. *Semb. Carth. 184.*

## (O 4.) In actions.

(O 4.) *When a plaintiff or demandant, defendant, or tenant, &c. shall not be amerced.*] In all actions real or personal, if the writ abates by the act of God, and not by the default of the party, the demandant, or plaintiff, shall not be amerced: as, if it abate by the death of the demandant or plaintiff. *Co. L. 127.*

So, where several join in a suit, which fails for the default of one only, the others who were not in default shall not be amerced: as, if one plaintiff be nonsuited, (in a case where the nonsuit of one will be the nonsuit of both,) he who appears shall not be amerced. *8 Co. 61. a. 1 Rol. 213. l. 49.*

So, in judicial process, if the writ abates, or the plaintiff be nonsuited or barred, the plaintiff shall not be amerced; because the suit is founded upon a record. *8 Co. 61. a. 1 Rol. 214. l. 4. 16.*

As, in a *quid juris clamat.*

In a *scire facias*, &c. *11 H. 4. 7. a.*

So, if the plaintiff discontinue he shall not be amerced: for it is the act of the court. *8 Co. 61. a. 1 Rol. 225. l. 1.*

Nor, if the court be ousted of jurisdiction. *8 Co. 61. b.*

So, if the plaintiff recover upon all the causes of action contained in the declaration, he shall not be amerced, tho' he recover less than was demanded; as, if the plaintiff declare *ad dampnum 40l.* and recover only *20l.* *Cro. El. 257.*

If there be *trover* for 500 load of goods, &c. and he recovers but for 100 load,

So, in an action against several, if he recover against each for part. *R. 1 Rol. 217. l. 45.*

Or, against husband and wife, if the husband be acquitted; for he must be joined for conformity. *8 Co. 61. a. 1 Rol. 217. l. 40.*

So, in an action for words, if it be found for the plaintiff as to all the material words, tho' it be against him for words not material. *R. 1 Rol. 217. l. 12. Qu. Dy. 75. a.*

In wast for cutting down twenty trees, if it be found for the plaintiff only for two *Per Berkley; but the other J. dub. Cro. Car. 453.*

In ejectment for a manor, and it be found for the plaintiff for the manor, but not as to the services. *R. 1 Sid. 232.*

So, if the plaintiff join issue to part, and demur to the other part, and the demurrer be adjudged for him, whereupon he enters a *nolle prosequi* as to the issue. *R. 1 Rol. 217. l. 5. R. 2 Mod. Ca. 198.*

So, if the defendant, or tenant in all actions real or personal, which do not charge force or deceit, comes at the first day, and renders the thing demanded, he shall not be amerced. *R. 5 Co. 49. b. 8 Co. 61. b. 1 Rol. 212. l. 20. 27. 51.*

So, if he comes at the first day, and makes defence by attorney, and pleads *non sum informatus*; for that is the same as to the plaintiff as if he had confessed the action. *R. 1 Rol. 213. l. 1. 17.*

So, the king, or queen, shall never be amerced. *8 Co. 61. b.*

Nor, an infant generally; for the entry shall be, *sed nihil de misericordia quia infans*, *Dy. 338. b. Adm. Cro. Car. 410. R. 1 Rol. 214. l. 50.*

And if an amerciament be entred against an infant, he shall be pardoned of course, and the entry shall be, *ideo in misericordia, sed pardonatur quia infans*, *8 Co. 61. b. 1 Rol. 214. l. 41.* Tho'

Tho' the infant be a defendant with others in ejectment, trespass, &c. R. 2 Cro. 274.

(O 5.) *When a plaintiff or demandant shall be amerced.*] But in all actions real or personal, if there be a default in the plaintiff, or demandant, he shall be fined, or amerced.

And therefore, in all writs of entry, *precipe quod reddat, permittat, or faciat*, if the writ abates for matter or form, or the demandant be nonsuited or barred, he shall be amerced. 8 Co. 60. b.

So, in all personal actions, which charge with force and deceit, and which do not, if the writ abates for matter or form, or the plaintiff be nonsuited or barred, he shall be amerced *pro falso clamore*. 8 Co. 61. a.

So, if he enter a *retraxit*, he shall only be amerced, tho' he be in contempt of the court. 8 Co. 60. a.

So, in all actions real or personal, if the demandant or plaintiff be barred for part of his demand, tho' he recovers for other part, he shall be amerced. Dy. 89. a. 8 Co. 61. a. R. Mo. 692. R. Cro. El. 699. *Vide ante*, (O 4.)

Or, if there be several tenants or defendants, and he be barred as to one, or as to part against one, tho' he recovers against the others. R. 1 Rol. 216. l. 10. 2 Cro. 630.

As, in covenant for several covenants broken, if he recover upon one, and be barred as to the residue. R. 1 Rol. 216. l. 35.

In *assumpsit* upon several promises, and he recover only upon one.

Or, *assumpsit* for several things, if he recover only for one, and be barred for the other, tho' the *assumpsit* was entire. 1 Rol. 216. l. 40.

In *wast in domibus & gardinis*, if he recover only for *wast in domibus*. Cro. Car. 453. 1 Rol. 217. l. 17.

(O 6.) *When a tenant, or defendant.*] So, in all actions real or personal, if the plaintiff recover, the tenant, or defendant, shall be amerced, or fined; unless where he comes the first day in actions which do not charge force or deceit.

In all writs of *precipe*, 8 Co. 60. b. he shall only be amerced.

So, in an assise for rent, where the *disseisin* was only by denial. 1 Rol. 223. l. 25.

In an attain, where the defendant was only tenant by receipt. 8 Co. 60. a.

So, in all personal actions, which do not charge with force or deceit, the defendant shall only be amerced; as, in account. 8 Co. 61. a. R. Cro. El. 107.

In *assumpsit*. 1 Rol. 223. l. 1.

In an action upon the case. 1 Rol. 222. l. 40.

Tho' it be upon the custom of the realm; as, against a carrier, hostler, &c. R. 2 Cro. 224.

Tho' it be an action upon the case for a deceit. 8 Co. 59. b.

In *trover*. R. Sav. 37.

In an action upon a statute for non-feasance; as, upon the *st. of Wint.* or the *st. 2 Ed. 6.* for not setting out tythes. *Vide post.* (O 8.)

So, in an action for *scandalum magnatum*. *Semb.* 1 Lev. 148.

So, the defendant shall be only amerced, if he deny the deed of another; or if, *relicta verificatione*, he confess the action after denial of his own deed. *Vide post.* (O 8.)

(O 7.)



(O 7.) *When there shall be a capiatur. Against the plaintiff.*] In an appeal for felony or mayhem, if the writ abates by the default of the plaintiff, or he be nonsuited or barred, the plaintiff shall be fined, and the entry of the judgment shall be by *capiatur*. 8 Co. 60. a.

So, in an attain. *Ibid.*

So, in a recaption; unless it be brought in a county-court, which not being a court of record, there can be no fine. 8 Co. 60. b.

So, where the plaintiff appears to be vexatious: as, if he sue in C. B. and also in London, or other court, for the same cause. 8 Co. 60. a.

So, in trespass, if the verdict be against the plaintiff. 1 Rol. 225. l. 20.

(O 8.) *Against the defendant.*] So, in all actions *vi & armis*, or which charge the defendant with force or deceit, if there be judgment against him, he shall be fined. Dy. 89. a. 8 Co. 59. b.

As, in trespass for an assault and battery, &c. Cro. El. 84. 1 Rol. 222. l. 26.

In *rescous*, tho' it be in the nature of an action upon the case. 1 Rol. 222. l. 30. Hob. 180.

In *assise*, if the *disseisin* be found to have been with force. 8 Co. 59. b.

In a writ of deceit upon a recovery by default in a real action, if non-summons be found. *Ibid.*

In an attain, if the defendant was a party to the first record. 8 Co. 60. a.

So, in all cases, where the defendant is fined, the judgment ought to be, *quod capiatur*: as, in an indictment, &c. R. 1 Rol. 225. l. 25. Cro. Car. 340. Jon. 407.

Or, if he be present, he shall be committed, and then no *capiatur* is necessary; and if the *ideo in misericordia* be also entred, it is *surplage*. R. Cro. Car. 340.

So, if the defendant deny his own deed, and it be found against him, he shall be fined. Dy. 67. b. 8 Co. 60. a. Dy. 245. b. 1 Rol. 219. l. 46. 224. l. 15. 33 H. 6. 54. b. 2 Sand. 192.

Or, if he plead a false deed made to himself. 8 Co. 60. a. 1 Rol. 219. l. 45. 224. l. 17. 2 Cro. 225.

Otherwise, if he plead a false deed to another, or deny the deed of another. 8 Co. 60. a. 1 Rol. 224. l. 37.

Or, deny his own deed, or plead a false deed to himself, if, *relictâ verificatione*, he confesses the action. R. 33 H. 6. 54. b. D. cont. Dy. 67. 8 Co. 60. a. Per two J. acc. Gawdy cont. 2 Cro. 64. R. acc. 1 Rol. 224. l. 42. 2 Cro. 420. Dub. per Twisden; sed Sand. semb. acc. 2 Sand. 191. Dub. Ray. 195. 202.

So, in *replevin*, if the defendant claims property, and it is found against him in a *proprietas probandâ*. 8 Co. 60. a.

So, in all actions where the defendant is charged for a contempt against the king's writ: as, in a *quare incumbravit*, *quare non admisit*, prohibition, &c. *Ibid.*

So, in all actions upon statutes, where the defendant is not sued for a duty: as, in ravishment of ward. 8 Co. 60. b. 2 Cro. 631.

In debt upon the *st. of Marl.* 52 H. 3. 1. or the *st. 1 & 2 Ph. & M.* 12. for carrying a distress out of the county. R. 1 Rol. 222. l. 42. 45. Qu. Dy. 177. b.

In debt upon the *ſt.* againſt uſury. *R. 1 Rol. 223. l. 5.*

Otherwiſe, in an action upon a ſtatute for non-ſealance: as, upon the *ſt. of Wint.* againſt the hundred. *R. 2 Cro. 348.*

Or, in debt upon the *ſt. 2* (or 2 & 3) *Ed. 6. 13.* for not ſetting out his tythes. *1 Rol. 223. l. 10. R. Sho. 81.*

So now, by the *ſt. 5 & 6 W. & M. 12.* in treſpaſs, ejection, affault, or falſe imprisonment, no fine or *capiatur pro fine* ſhall be charged, but the plaintiff in ſatisfaction of it ſhall pay 6*s.* 8*d.* on the judgment, which ſhall be allowed him in coſts.

And therefore, if a *capiatur* be now awarded in ſuch a caſe, it will be error. *R. 5 Mod. 285.*

And ſince the ſtatute no fine or *capiatur* is entred in *B. R.* *1 Sal. 54.*

In *C. B.* the entry is *nihil de fine quia remittitur per ſtatutum. Ibid.*

(O 9.) *When ſeveral amerciaments are allowed.]* The plaintiff may be amerced ſeveral times. *1 Rol. 218. l. 10. 15. 8 Co. 61. a.*

But the defendant ſhall be amerced only once. *8 Co. 61. a. R. 5 Co. 58. b.*

Tho' he plead ſeveral pleas. *5 Co. 58. b.*

Or, confeſs for part, and plead to iſſue to the other part, which is alſo againſt him. *Ibid.*

Yet, if the defendant pleads ſeveral pleas, and both are againſt him, there may be an amerciament againſt him upon one, and a *capiatur* upon the other. *R. 1 Rol. 213. l. 13.*

So, in an account upon a judgment *quod computet*, the defendant ſhall be amerced, and again afterwards, if he be found in arrear upon a final judgment againſt him. *1 Rol. 218. l. 10.*

So, if a defendant or tenant confeſs a judgment for part, and plead to another part, upon which judgment is afterwards againſt him, there may be a ſeveral amerciament upon each judgment. *R. 1 Sal. 253.*

For both the judgments are final and independent. *1 Sal. 54. 5 Mod. 65. 67. Skin. 593.*

So, if there are ſeveral defaults by the ſame defendant, there may be ſeveral amerciaments againſt him. *2 Led. 4. 185.*

So, if there are ſeveral defendants who plead ſeverally, they may be ſeverally amerced. *5 Co. 58. b.*

#### (O 10.) Remedy for an Amerciament.

(O 10.) *By diſtreſs.* When and how it ſhall be aſſeered.] If an amerciament in a leet be aſſeered, the lord may diſtrain for it of common right, without preſcription. *R. 2 Cro. 382. 8 Co. 41. Kit. 43. Vide ante, (O 2.)—Vide Diſtreſs, (A 1. 3.—B 3.)*

A diſtreſs for an amerciament may be in any place within the precinct of the manor. *Semb. Noy, 20.*

So, it may be upon any goods of the offender. (*Vide Noy, 20.*)—*Vide Diſtreſs, (B 3.)*

So, if an amerciament be upon a vill, the diſtreſs may be for the whole, upon any in the vill, if he was an inhabitant there at the time of the amerciament. *R. Cro. El. 698.*

But a diſtreſs cannot be taken for an amerciament in a place out of the jurisdiction.

Nor,

Nor, can the goods of a stranger be taken, tho' they be upon the land of the offender. *Semb. Noy, 20.*

So, the bailiff cannot distrain for it *ex officio*, but he must have the steward's precept. *Per Poph. Gawdy cont. Cro. El. 698. Mo. 574. R. 3 Mod. 138.*

And if he justifies in trespass, he must shew the precept. *R. 3 Mod. 138.*

Otherwise, in *replevin*. *Adm. 3 Mod. 138.*

So, if the defendant justifies by distress for an amerciament upon a vill, he must alledge that no one else has paid it. *R. Cro. El. 698. Mo. 574.*

(O 11.) *By debt.*] So, debt lies for an amerciament affected. *R. 2 Cro. 382. Adm. 2 Cro. 582. Kit. 43. b. Vide 1 Wilf. 248. et seq.*

[And debt on amerciament may be joined with debt on a *mutuatus*. *1 Wilf. 252, 3.*]

[Amerciament of a freeholder must be *proved* to be affected by freeholders of the manor, or debt will not lie for it. *Baldwin v. Tudge, H. 28 Geo. 2. 2 Wilf. 20.*]

### L E G A C Y.

*Vide Administration*, (C 3. 5, &c.)—*Chancery*, (3 A 3, &c.—3 G 3, &c.—3 Y 1, &c.)—*Prohibition*, (G 17.)

### L E G A T E.

*Vide Popery*, (A 2.)

### L E G A T E E.

*Vide Chancery*, (3 G 3, &c. 7.—3 Y 18, 19.)

### L E P R O S Y.

#### (A) Leprosy.

**T**HERE are many sorts of leprosy. *F. N. B. 234. G.*

#### (B) How restrained.

**I**F a man, who is a visible leper, will intrude himself into a church, or the company of his neighbours, to their nuisance, or disturbance, a writ shall be directed to the mayor, bailiff, &c. of the town to inquire whether he be a leper, &c. *tunc honestiori modo, quo poterit, a communicatione hominum amovere, &c.* *F. N. B. 234. D.*

And if he will not execute the writ, they shall have an *alias, pluries*, and attachment. *F. N. B. 234. F.*

But if he does not appear to be a leper by the visible putrefaction of his flesh, and the smell of his ulcers, he shall not be removed. *Semb. F. N. B. 234. G.*

Or,



Or, if he be a visible leper, if he keeps himself within his house.  
F. N. B. 234. G.

L E T T E R S.

Letter of Attorney.

*Vide Attorney, (C 1, &c. 5, &c.)*

Letters Patent.

*Vide Patent.*

Letter to a Peer.

*Vide Chancery, (D 2.)*

L E V A R I F A C I A S.

*Vide County, (C 10. 13.)—Execution, (C 3.)—Process, (E 4.)—Statute  
Staple, (D 3.)*

L E V E L.

*Vide Sewers.*

L E V I T I C A L D E G R E E S.

*Vide Baron and Feme, (B 4.)*

L E V Y I N G W A R.

*Vide Justices, (K 4.)*

L E Y.

(A) What Laws are allowed in *England*.

**D**IVERS laws are used and allowed within the kingdom of *Eng-*  
*land*; which are all part of the laws of the realm. *Co. L. 11. b.*

The law of the realm is, *scripta, vel non scripta.*

As to the law in writing, or statute law, and the laws and usages of  
parliament, *vide Parliament, (G 1, &c.—H 1, &c.)*

The law, not in writing, comprehends the common law, strictly  
so called, and the particular laws allowed in peculiar courts in pe-  
culiar cases.

As to the canon and civil law allowed in the ecclesiastical courts,  
in the admiralty, and the court of *chivalry*, *vide Admiralty.—Canons.  
—Courts, (E 1, &c.)*

The common law, strictly so called, regulates the proceedings in  
the usual courts of justice; and if it be applied to criminal cases is  
called *the crown law*. *De qua vide Justices, and Justices of Peace.—  
Vide Action, (D 1.)*

If it be applied to the affairs of the king, it is termed *the Prærogative law*. *De qua vide Prærogative*.

If to matters within the forest, &c. it is termed *lex forestæ*. *De qua vide Chase*.

If to trade or commerce, it is called *lex mercatoria*. *De qua vide Merchant (D)*.

If to customs of particular places, the name varies according to the places: as, in *Ireland*, they are termed *the laws of Ireland*. Of which *vide Ireland*.

In *Scotland*, *the laws of Scotland*. Of which *vide Scotland*.

In *Jersey*, *Guernsey*, *Man*, &c. *the Laws of Jersey*, *Guernsey*, or *Man*, &c. *Vide Navigation*, (F 2, 3, 4, 5.)

In the plantations, *the laws of the plantations*. *Vide Navigation*, (G 1, &c.)

As to laws in *Wales*, *vide Wales*.

[The courts in *England* do not take notice of foreign revenue laws. *Planche v. Fletcher*, B. R. M. 20 Geo. 3. *Dougl.* 251.]

[So, it is a general principle that the penal laws of one country cannot be taken notice of in another. By *Buller J. Ogden v. Folliott*, B. R. T. 30 Geo. 3. 3 T. R. 733. *Vide Holman v. Johnson*, B. R. T. 15 Geo. 3. *Cowp.* 341.]

## (B) The Original and Grounds of the Common Law.

THE foundations of the common law; are 1. the law of nature or reason; 2. the divine law; 3. general customs; 4. divers principles, or maxims; 5. several particular customs. *D. & St. Dial.* 1. ch. 4. at the end.

And it was called *the common law*, because of the code of laws collected by *Edward the Confessor* out of the laws before used in the several provinces during the heptarchy, was common to the whole realm. 1 *Ch. R. Arg.* 60.

[Common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country. By *Lord Kenyon Ch.-J. Ball v. Herbert*, B. R. E. 29 Geo. 5. 3 T. R. 261.]

## (C) What Realms are governed by the Laws of England.

THE common law is the inheritance of all the subjects of the realm.

And therefore, in the plantations, or elsewhere, where colonies of *English* are settled, they are to be governed by the law of *England*. *Ca. Parl.* 31. *Vide Navigation*, (G 3.)

If the king makes a conquest of an infidel kingdom, the antient laws are abrogated *ex instanti*, and it ought to be governed by such laws as the king appoints. 7 *Co.* 17. b. *Calvin*. *Ca. Parl.* 31.

So, if the laws of *England* are once established in another realm, which the king obtains by conquest, they cannot afterwards be altered, except by parliament. 7 *Co.* 17. b. *Calvin*.

So, if a foreign territory, not inhabited, be obtained by the crown of *England*, all laws in *England* bind there. *R. Sal.* 411.

But

But if a conquest be made of a christian kingdom, the antient laws remain there, till they are altered. 7 Co. 17. b. Calvin. R. 4 Mod. 225.

So, if a christian kingdom descend to the king, the antient laws cannot be altered, but by parliament. 7 Co. 17. b. Calvin.

So, if an infidel kingdom be gained by conquest, tho' the laws there are abolished, yet the laws of *England* are not of force till it be so declared. R. Sal. 411.

And till the laws of *England* are declared to be of force there, such infidel kingdom, gained by conquest, shall be governed by their antient laws, which are not contrary to the law of God, (for those do not seem to be absolutely abolished till other laws are introduced,) or by the rules of natural equity. Sal. 412.

## (D) Professors of the Law.

### (D 1.) Apprentices.

THE professors of the law, till 2 H. 3. were usually of the clergy. Doug. O. J. 21. or rather till the year 1164. Temp. H. 2. when by the canon in *sinodo Turonensi sub Alex. 3. papa*, it was ordered, *quod post votum religionis nullus ad physicam vel leges mundanas legendas permittatur exire*. Seld. Diff. ad Fl. 519.

By the st. W. 1. 29. *si ul serjeant, counter, ou auter face ul maner de disceit, ou de collusion en la court le roy, ou consent de faire la, en disceit de la court, pur engin. le court, ou la partie, et de ceo soit attain, lors puis eit la prisonment dun an et un jour, et ne soit oye en la court le roy a counter pur nulluy. Et si soit auter que counter, per mesme le maner eit la prison dun an et dun jour a tout le meins. Et si le trespasss demande greinder paine soit a volente le roy.*

And this extends to a serjeant, and also to an apprentice of the law. 11 Ed. 4. 2 Inst. 214.

And if an apprentice refuse to be counsel for any, when assigned by the court, he may be excluded from the bar. 11 Ed. 4. 3.

[A *mandamus* will not lie to compel admission to the degree of barrister. *Rex v. Gray's Inn*, E. 20 Geo. 3. Doug. 353.]

[The only mode of relief is by appeal to the twelve judges. *Ibid.*]

### (D 2.) Serjeants of the Law.

(D 2.) *How created.*] The serjeants of the law are commanded by the king's writ to take this state and degree: for by the chief justice of C. B. by the assent of all the justices, the names of the most worthy in the study of the law are presented to the chancellor, who by the king's writ assigns a day to them to take *statum & gradum servientis ad legem sub pœna*, &c. Fort. c. 50.

If they do it not at the day of the return of the writ, they shall be at the king's mercy. 2 Rol. 167. l. 10.

And *ex rigore*, they cannot take it afterwards. 2 Rol. 167. l. 17.

If their creation be void, as in the time of the usurpation, they may be required *de novo* to take the same state and degree. 1 Sid. 3.

If the writ be returnable *immediatè*, whereupon the serjeant appears before the chancellor in the vacation, and is sworn, it is not legal. R. Cro. Car. 2 Jan. 63.

After



After the writs to the serjeants, they appear before the justices of one of the benches, and make their counts, &c. and being robed with coifs, &c. go to *Westminster* attended by the marshal, warden, benchers, and others of their respective societies, and there make counts, &c. *de novo*, and afterwards return to serjeant's-inn, and make a feast there. *Cro. Car. 4. Jon. 63.*

The serjeants have precedence according to their antienty in admittance.

If a man created a serjeant was before speaker of the house of commons, he shall take place according to his admittance, and shall not have precedence of the other serjeants. *R. per Popb. and the greater part of the judges and barons; the lord keeper, four judges and twelve privy counsellors cont. 2 Cro. 2.*

(D 3.) *What privileges belong to them.*] A serjeant of the law has privilege for himself and his clerks, that they shall not be sued but in the courts of *Westminster-hall*.

And therefore, if they are sued in the *Marshalsea*, &c. an inhibition shall go out of *C. B.* to surcease. *R. Cro. Car. 84.*

But the privilege does not extend to a court in *Westminster-hall*, and therefore he may be sued in *B. R.* for he may practise there. *R. 2 Lev. 129.*

[A serjeant sued in *B. R.* may plead his privilege, that he ought to be sued in *C. B.*; but if he has long retired from the bar it shall not be allowed. *Serjeant Mead's Case, 2 Wilf. 232.*]

So, the privilege does not extend to a prohibition. *Dub. 1 Sid. 65.*

So, a serjeant shall have privilege to sue by attachment of privilege, and by not writ.

Tho' he sues as heir. *Per Englefd. Fitz. cont. Dy. 24. a.*

But he shall be sued by original writ, and not by bill. *Semb. 11 Ed. 4. 2. b.*

And if he be sued by bill, he may plead his privilege. *11 Ed. 4. 2. b.*

[A serjeant cannot prevent the venue being changed, unless he sues by writ of privilege. *Barnes, 484.*]

So, a serjeant at law shall serve upon a jury, for necessity, where a peer is party to the action, and there is no other knight who has a freehold in the county. *2 Mod. 182.*

If he does not serve as counsel when assigned by the court, he may be excluded from the bar. *11 Ed. 4. 3.*

Tho' assigned by the chief justice of *B. R.* *Ibid.*

But a serjeant may be discharged by the king's writ, of his title and degree. *Dudg. 140.*

So, the acceptance of the office of a judge, commissioner of the great seal, &c. discharges him from the office of king's serjeant. *R. 3 Lev. 351.*

But the office of a judge, or baron, does not discharge him from the degree of a serjeant. *3 Lev. 351.*

Nor, the office of commissioner of the great seal. *R. 3 Lev. 351.*

Nor, a patent to be a peer of the realm.

### Act of Law.

*Vide Condition, (L 13.)*

## Authority of Law.

*Vide Imprisonment, (H 4, &c.)*

## Enacting of Laws.

*Vide Parliament, (G 10, &c.—R 3, &c.)—Prerogative, (D 1.)*

## LEY - GAGER.

*Vide Wager of Law.*

## LIBEL.

### (A) Libel; what shall be.

**A** LIBEL (*libellus famosus*) is a contumely, or reproach, published to the defamation of the government, of a magistrate, or of a private person.

And it may be in writing. *5 Co. 125. b. Vide infra.*

[But it is not a breach of the peace; and therefore a member of parliament writing a seditious libel, is entitled to his privilege from being arrested for the same. *2 Wilf. 159.*]

As, if a man publishes a rhyme, epigram, or other writing made to the defamation of another, &c. *5 Co. 125. b.*

Writes a letter, and sends it to another. *R. 12 Co. 35. Vide post. (B 1.)*

Or, it may be without writing. [*Vide Sal. 418.*]

As, if he makes a picture in an ignominious manner, or any ignominious sign to the reproach of another. *5 Co. 125. b.*

If he makes the sign of a gallows, &c. upon the door of any one. *Ibid.*

[If a mayor send a licence to keep a public-house, to a peer. *Mayor of Northampton's Case, P. 7 Geo. Str. 422.*]

### (A 1.) In Defamation of the Government.

So, if he makes the king's arms, with a text that insinuates calumny, in a church. *Sav. 49.*

If he writes, *preachers run to the queen as tho' they were to be directed by her to tarry for reformation.* *R. Sal. 49.*

[If A. publish an advertisement that money had been collected at a meeting for the relief of the widows, &c. of those who, preferring death to slavery, were for that reason only inhumanly murdered by the king's troops. *Cowp. 673.*]

### (A 2.) Of a Magistrate.

So, a libel against a magistrate tends to the scandal of the government. *5 Co. 125. a.*

It will be a libel, if A. delivers a writing to a parson to be published in a church, which says, *bewail the sodomy and wickedness in this city*

city which go unpunished by the magistrate, tho' it does not say, that the magistrates knew it. *R. 1 Sid. 219.*

If one writes to a privy counsellor, *that the chief justice, &c. will do nothing by the command of the king.* 3 *Inst. 174.*

So, a libel on one who was formerly a judge, which charges him with perjury, &c. in his office, when he was a judge. *R. Cro. Car. 175. 1 Sid. 271.*

[An order made by a corporation and entred in their books, stating that *A. B.* (against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in *C. B.*) was actuated by motives of public justice in preferring the indictment, is a libel reflecting on the administration of public justice. 2 *T. R. 199.*]

So, words of a justice of peace, which affect him in his office, are indictable, tho' they are not actionable: as, *A. is a buffle-headed fellow, doth not understand law, and hath not done B. justice.* *R. 3 Mod. 139. Comb. 65. Vide post. (C 1.)*

So, tho' he might have an action for the same words. *R. Carth. 15.*

So, words, of a judge, which reflect upon him. 1 *Sid. 271. Cra. Car. 504.*

[These seem not to be libels.]

#### (A 3.) Of a Private person.

So, a libel against a private person deserves severe punishment; for it incites the whole family to revenge, and by consequence tends to quarrels, and the breach of the peace. 5 *Co. 125. a. R. per three J. 1 Sid. 270. 1 Lev. 139.*

As, if one writes to a woman to whom *B.* is suitor, *that B. has the pox, and is not worth a groat.* *R. 1 Sid. 271.*

To his debtor, *that if he had honesty, civility, or humanity, he would not deal so, but would go to hell and be damned for cheating.* *R. Ray. 201.*

[If one publish an advertisement of a tradesman, that tho' he pretends so and so, yet all gentlemen should be cautious, for he dares not engage with any artist in town; it is a libel, and actionable. *Herman v. Delany, P. 4 Geo. 2. Str. 898.*]

[To print of any person that he is a swindler is a libel and actionable. 1 *T. R. 748.*]

[Any thing that tends to make a man ridiculous, or to hinder men from associating with him, is a libel; as, that he stinks of brimstone, and is an old stinking, old nasty, old itchy, old toad. *Villers v. Monsley, P. 9 G. 3. 2 Wilf. 403. Rex v. Benfield, P. 33 G. 2. 2 B. M. 980.*]

So, it will be a libel, tho' wrote in *French* or other foreign language. 3 *Inst. 174.*

If it be a translation of a declaration in prohibition, &c. distributed with intent to disparage. 2 *Mod. 119.*

If he publishes in writing, tho in words not actionable. *F. g. 121. 253.*

Tho' it be true; for it tends to private quarrels and revenge. *R. 5 Co. 125. b.*

Tho' the person against whom be of ill fame. 5 *Co. 125. b.*

Tho' the magistrate or private person, upon whom the libel is made, was then dead. *R. 5 Co. 125. a. [Rex v. Topham, H. 31 G. 3. 4 T. R. 126.]*

So, making a libel is punishable, tho' it be not published. *R. Med. 167.*



And he who procures another to make a libel, will be a contriver.

*R. Mo. 813.*

If *A.* dictates to *B.* who writes a libel, both are makers. *R.*

*5 Mod. 167.*

So, he who approves it, when wrote. *Ibid.*

(B) Publication.

(B 1.) What shall be.

A LIBEL may be published by speaking, singing, or delivery.  
*5 Co. 125. b.*

As, if a libel be maliciously repeated in the presence of others.

*5 Co. 125. b.*

As, if after hearing or reading, he reads it. *R. 9 Co. 59. b.*

*Mo. 813.*

Or, relates the effect of it. *12 Co. 35. Mo. 813.*

Or, speaks it by way of question, *did not you hear that A. did so, &c.?* *R. 12 Co. 134.*

So, if a libel be maliciously sung in the presence of others. *5 Co. 125. b.*

So, if he sends a servant for a paper who mistakes, and then he fetches a paper which is read, and is a libel, he will be the publisher.  
*Semb. 5 Mod. 167.*

So, if a libel, or a copy, be delivered to another. *5 Co. 125. b. Mo. 813.*

Or, the copy of a letter, written by himself to the scandal of another, be dispersed. *R. 12 Co. 35.*

So, if any letter that contains a libel is sent sealed to another. *12 Co. 35.*

Or, sent to the party himself against whom it is made. *R. 12 Co. 35. R. Hob. 62. 215. Popb. 139.*

If he lends the libel to another to be copied. *R. Mo. 813.*

So, he who procures the publishing, as well as he who publishes, is a publisher. *Ibid.*

As, if the servant of *A.* who has a shop for the sale of pamphlets, sells a libel in the shop for the benefit of *A.* tho' *A.* was not privy to the contents, or sale. *R. F. g. 47.*

So, if a man writes a copy of a libel, it will be evidence of a publication. *Sal. 418.*

Or, if he has in his custody a libel publickly known. *Ibid.*

But the having a copy of a libel not published, in his custody, is not evidence of a publication. *Ibid.*

[Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, and had occasionally applied at the stamp-office respecting the duties, is evidence that he is the publisher. *Rex v. Topham, H. 31 Geo. 3. 4 T. R. 126.*]

[The publication must be stated in the declaration; but it may be collected from the whole of it, and requires no technical form of words. *2 Bl. Rep. 1037.*]

(B 2.) What not.

But if a man finds a libel and burns it, or delivers it to a magistrate, when

when it concerns a private person, it will not be a publication. *R. 5 Co. 125. b.*

So, if it concerns a magistrate, he ought to deliver it to the magistrate, to have inquiry made for the author. *Ibid.*

And if he did not, he might have been punished in the Star-chamber.

But tho' he does not, but keeps it to himself without any publication, he is not now punishable for the libel. *Per Cur. 1 Vent. 31.*

So, it will not be a publication of a libel, if he takes a copy of it, if he never publishes the copy. *Semb. cont. Sal. 418.*

If he reads, or hears a libel read, not knowing that it was a libel. *R. 9 Co. 59. b. Mo. 813.*

Tho' he laughs upon hearing it. *9 Co. 59. Mo. 813.*

Tho' he takes a copy, or reads it by command of his father, or master. *R. Mo. 813.*

So, if a man delivers by mistake a paper out of his study, it is not a publication, tho' it be a libel. *R. 5 Mod. 167.*

### (C) Libeller.

(C 1.) Who is not.

**B**UT a man is not punishable for a libel, if he does not contrive it, nor procure the composition or contrivance of it. *R. 9 Co. 59. b. Lamb.*

Or, does not publish it, knowing that it was a libel. *9 Co. 59. b.*

[But it is not competent for a defendant to prove that a paper, similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. *Rex v. Holt, M. 34 Geo. 3. 5 T. R. 436.*]

[If defendant has owned himself author of a book, *errors of the press and some small variations excepted*, it is sufficient to entitle the prosecutor to have the book read, and the defendant shall be put to shew that the variations were material. *Rex v. Hall, H. 7 Geo. 3. Str. 416.*]

So, words to the diminution of a magistrate, do not make a libel, if they do not impeach him in his office: [nor, unless in writing. *Vide Sal. 417, 418.*] and therefore, a man is not indictable, if he says, *justices of peace have nothing to do with the excise.* *1 Vent. 10. Vide ante, (A 2.)*

Or, *the justices of peace don't understand the laws of excise, and many parliament-men don't understand them, if they read them*, tho' they are causes for binding to good behaviour. *R. 1 Vent. 16.*

(C 2.) *If done in a course of justice.*] So, it will not be a libel if a man charges another with a crime in a course of justice: as, by an appeal for murder, robbery, rape, or other felony. *2 Inst. 228.*

Or, by indictment for such crime.

Tho' the charge be false. *2 Inst. 228.*

So, if he writes a falsity of another for the instruction of his counsel, attorney, &c. in a course of justice. *Ibid.*

Or, speaks it in evidence to a jury. *Ibid.*

Or, uses such words in any manner, in a course of justice. *Ibid.*

Or, says upon examination, that his bill, &c. is true. *R. 2 And. 28. Mo. 703, 6.*

[It is no libel to assign on the books of a quaker's meeting their reasons for expelling a member. 1 *Bl. Rep.* 386.]

But if a man charge another with felony or other crime, in the *Chancery, Star-chamber, &c.* or other court that has not jurisdiction of such offence, it will be a libel; for it is not in the course of justice. 2 *Inst.* 228. 2 *And.* 28. *Mo.* 143.

Tho' the bill was exhibited by a solicitor in his name, and in his absence, if he does not disclaim it, when he has notice of it. *Semb. Popb.* 152, 3.

So, if he charges with a crime of which the court has cognisance, if it be *ex mera malitia*, without colour, and not with intent to proceed against the defendant. *R.* 12 *Co.* 103. But it was agreed that this was not punishable by law, but only by fine and costs in the *Star-chamber.* *Mo.* 820.

So, if a paper against a petition to parliament be published containing foreign aspersions and slanders. *R. Hard.* 470.

[A copy of a report of a committee of the House of Commons, tho' reflecting on an individual, is no libel, and the court refused to grant a criminal information against the publisher. *Rex v. Wright, T.* 39 *Geo.* 3. 8 *T. R.* 293.]

(C 3.) How punished.

(C 3.) *By the common law.*] By the common law, every libelle shall be indicted, and if thereupon convicted shall be fined and imprisoned according to the nature of the offence. 5 *Co.* 125. 3 *Inst.* 174. *Cro. Car.* 175. 504.

[On the trial of an indictment for a libel, the only questions for the consideration of the jury are, the fact of publishing, and the truth of the *innuendos*. Whether the matter be or be not a libel is a question of law for the consideration of the court. 3 *T. R.* 428. *Vide stat.* 32 *Geo.* 3. c. 60. *contra.*]

Or, may be put in the pillory. 5 *Co.* 125. *b.*

So, he might have been punished by bill, or *ore tenus* upon confession in the *Star-chamber.* 5 *Co.* 125.

[A libeller may be fined, and bound to his good behaviour, on his confession in court. *Rex v. Middleton, 9 Geo. Fort.* 201.]

So, now an information may be exhibited against a libeller.

[And it need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false. *Rex v. Burks, M.* 37 *Geo.* 3. 7 *T. R.* 4.]

[If the libel be true, the court will not grant an information. *Rex v. Bickerton, H.* 8 *Geo. Str.* 498.]

[And it is a general rule, that in order to obtain an information for a *private* libel, charging a specific offence, the party libelled must deny the charge upon oath. *Doug.* 284.]

[Unless where the party libelled is abroad at a great distance, or the subject of the charge is general imputation, or an accusation of criminal language held in parliament. *Doug.* 387.]

[When a defendant is brought up for judgment his acts subsequent to the trial may be considered, either by way of aggravating or of mitigating the punishment, even tho' they be separate and distinct offences, for which he may be afterwards punished. *Rex v. Withers, M.* 30 *Geo.* 3. 3 *T. R.* 428.]

[But



[But in such cases the court will take care not to inflict a greater punishment than the principal charge itself will warrant. *Rex v. Withers, M. 30 Geo. 3. 3 T. R. 428.*]

And in such information the prosecutor may give in Latin the sense and import of the libel; and in such case it is sufficient, if the substance of the libel be recited, tho' not the words. *Sal. 661.*

Or, the prosecutor may recite the words of the libel; as, if he say, *quæ sequitur in his Anglicanis verbis*: and then a variance in any word defeats the prosecution. *R. Sal. 661.*

Or, if he say, *cujus tenor sequitur*. *Sal. 661. 417.*

Or, *quæ continet inter alia juxta tenorem sequentem*; for he need not set forth the whole paper; and if that which is omitted vary the sense of the other part, the defendant shall be found not guilty. *R. Sal. 417.*

Or, *juxta tenorem & ad effectum sequentem*, tho' *ad effectum* by itself would have been bad. *Ibid.*

But the charge must be certain: and therefore, *scripsit aut scribi causavit*, is bad. *2 Mod. Ca. 329.*

[All circumstances necessary to constitute the crime must be set out. *Cowp. 683.*]

[Where the writing is so clear as to amount of itself to a libel, all foreign circumstances introduced on the record are unnecessary. *Ibid.*]

[But where it does not in itself contain the crime without *extrinsic aid*, such extrinsic matter must be put upon the record by *averments*. *Id. 684.*]

[On an information for writing and publishing a libel "of and concerning" the king's government and the employment of his troops, (setting forth the libel verbatim,) "of and concerning" are a sufficient introduction of the *matter* contained in the libel, and a sufficient averment that it was written "of and concerning" the king's government and the employment of his troops. *Cowp. 682.*]

So, if a libel be to the defamation of another, an action upon the case lies, as well as an indictment. *R. Skin. 123, 4.*

[In an action for a libel, it must be laid to be of and concerning the plaintiff. *Lowfield v. Bancroft, P. 5 Geo. 2. Str. 934.*]

[If the charge in a libel be general; as, that the person libelled is a swindler; to an action for such a libel, the defendant, if he meant to justify, must state the particular instances of fraud: a justification generally in the words of the libel are not sufficient. *1 T. R. 748.*]

(C 4.) *By statute.*] Who are within the *st. W. 1.* and *2 R. 2. 5. vide Scandalum Magnatum in Action upon the Case for Defamation, (B 1, &c.)*

So, by the *st. W. 1. 34.* none shall be so hardy as to tell or publish false news, whereby discord or slander may arise between the king and his people, or the great men of his realm: and he who does so shall be detained in prison till he find in court him from whom the speech moved.

So, by the *st. 2 R. 2. 5.* none shall be so hardy to devise, speak, or tell any false news, lies, &c. of prelates, lords, &c. whereby discord or slander may arise within the realm, (*viz.* between lords, or the lords and commons,) on the pain inflicted by the said *st. W. 1. 34.* And this is confirmed by the *st. 12 R. 2. 11.*

And by the preamble of the *st. 2 R. 2. 5.* it is recited, that dev-

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sors were of false news and horrible lies of prelates, dukes, earls, barons, and other nobles, and of the chancellor, treasurer, privy seal, steward, justices of one bench or other, and of other great officers, &c.

Before those statutes, false rumours produced great mischiefs to the peace of the kingdom. 2 *Inst.* 226.

And for prevention of them, remedy was provided by those statutes, where any false news or rumours are invented or contrived. 2 *Inst.* 227.

So, against them who do not contrive, but disperse and relate such false news. *Ibid.*

Tho' they name their author for the relation. *R.* 12 *Co.* 134.

Within the *st. W.* 1. 34. are all contrivers or dispersers of false rumours of the king himself. 2 *Inst.* 228.

And by the *st. 2 R.* 2. (tho' that does not extend to the king) as well as by the *st. W.* 1. contrivers or relators of false news concerning the great men or officers of the realm shall be punished. 2 *Inst.* 227. 12 *Co.* 133.

So, any rumours are within the statute, whereby discord and slander may arise between the king and his nobles, or between the king and his people. 2 *Inst.* 227. 12 *Co.* 133.

(C 5.) *What remedy is provided.*] For false news of any great man, named by the *st. 2 R.* 2. 5. an action for *scandalum magnatum* lies. *Vide Action upon the Case for Defamation*, (B 1, &c.)

So, the party might have proceeded against him who spoke scandalous words against any such great man by bill in the *Star-chamber*, whereupon he should be fined and imprisoned, or have corporal punishment. *R.* 12 *Co.* 134.

Or, the attorney-general might have proceeded in the *Star-chamber* by bill, or *ore tenus* upon confession. *R.* 12 *Co.* 134.

So, the commission to justices of *oyer and terminer*, &c. gives authority to inquire *de illicitis verborum propalationibus*. 12 *Co.* 134. 2 *Inst.* 228.

Or, there may be a special commission for it. 2 *Inst.* 229.

And therefore, a contriver and reporter of false news, &c. may be punished by indictment.

A contriver or inventor, being convicted upon an indictment, has no express punishment against him by statute, but shall be left to the punishment due by the common law, *viz.* fine and imprisonment. 2 *Inst.* 228.

So, a relator shall be punished by fine and imprisonment; for the statute says that he shall be taken and detained, which implies that he shall be also fined. *Ibid.*

And this by the express words of the *st. 12 R.* 2. 11. which enacts, that if any imprisoned, &c. cannot find him from whom the speech moved, he shall be punished by the advice of the council.

So, by the *st. W.* 1. and 2 *R.* 2. 5. a man convicted for spreading false rumours, &c. may be imprisoned till he finds his author. 2 *Inst.* 229.

But where the indictment is general, for speaking of scandalous words, without reference to any author, the judgment shall not be, that he be imprisoned till he produce his author, tho' he heard the words before his speaking them. *R.* 12 *Co.* 134.

## LIBERATE.

*Vide Statute-Staple, (D 6.)*

## LIBERTATE PROBANDA.

*Vide Villenage, (C 3.)*

THE END OF THE FOURTH VOLUME.